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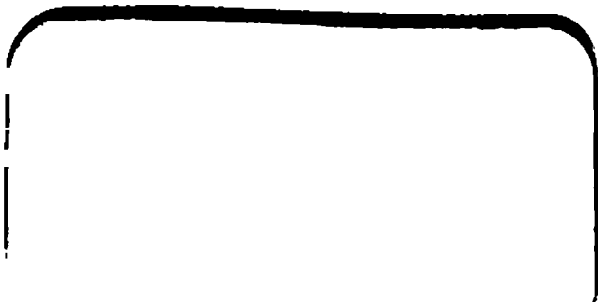
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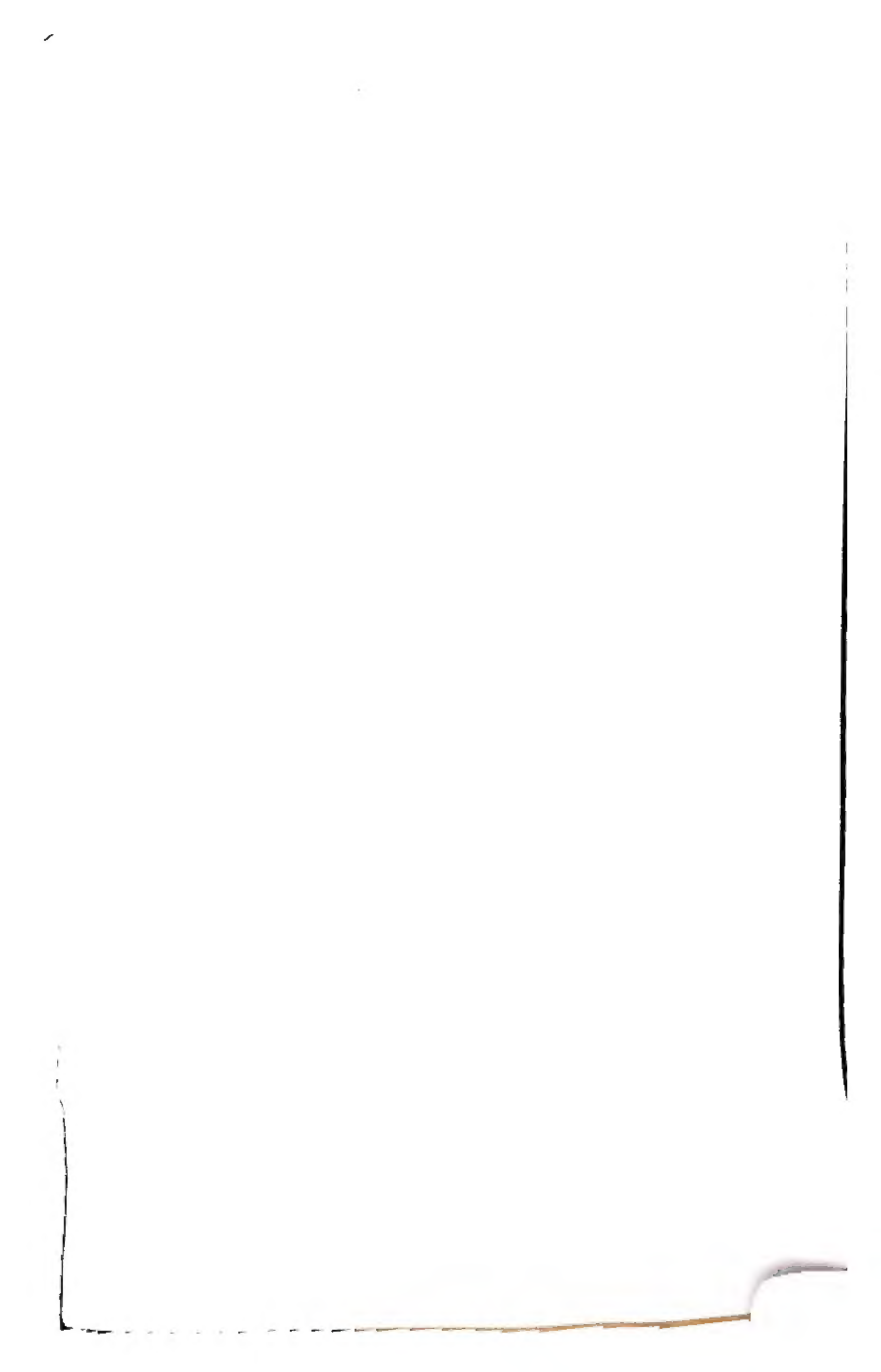
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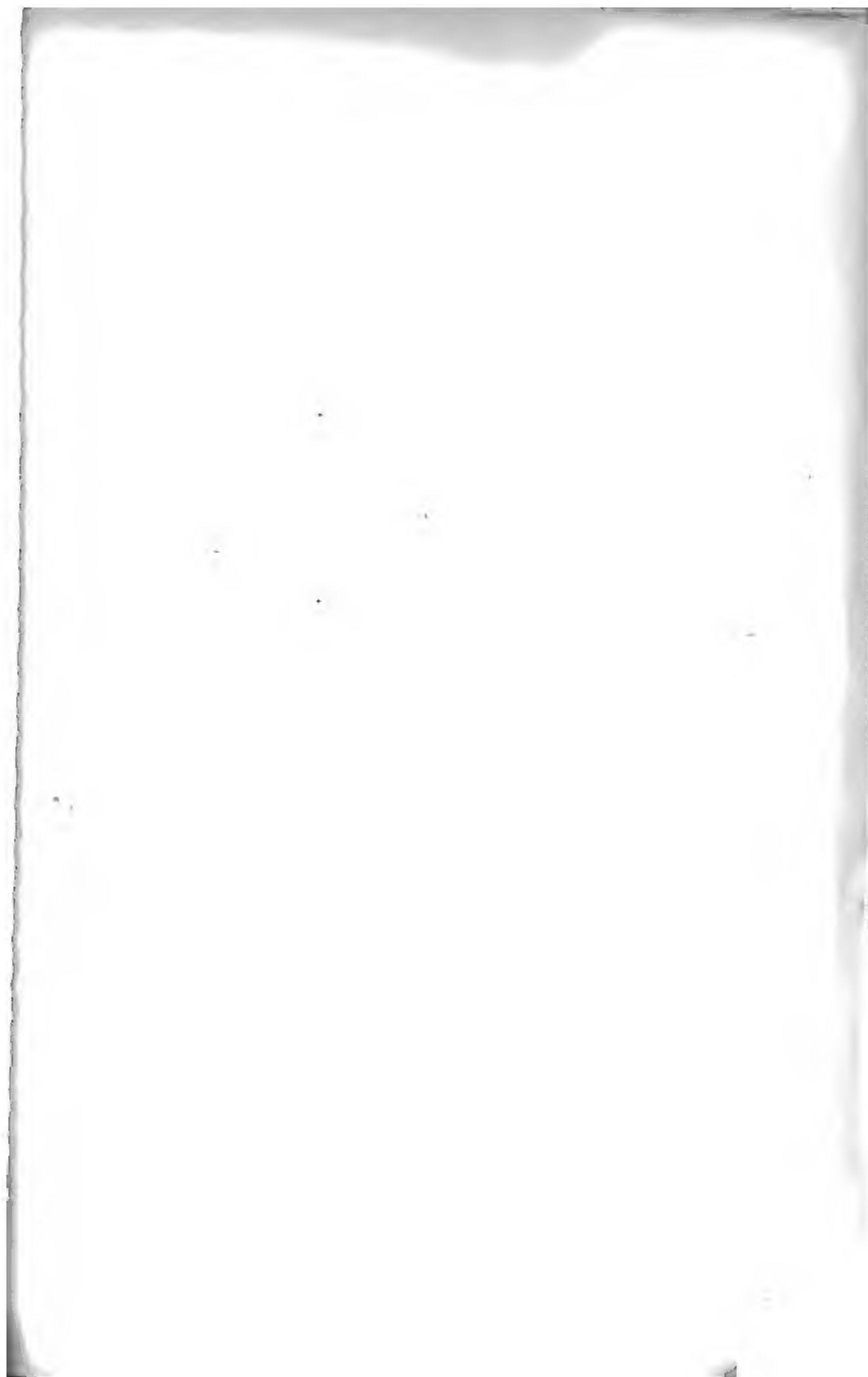




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AMERICAN NEGLIGENCE CASES

[CITED AM. NEG. CAS.]

**A COMPLETE COLLECTION OF ALL REPORTED NEGLIGENCE CASES
DECIDED IN THE UNITED STATES SUPREME COURT, THE UNITED
STATES CIRCUIT COURT OF APPEALS, ALL THE UNITED
STATES CIRCUIT AND DISTRICT COURTS, AND THE
COURTS OF LAST RESORT OF ALL THE STATES
AND TERRITORIES, FROM THE EARLIEST
TIMES, WITH SELECTIONS FROM
THE INTERMEDIATE COURTS.**

**TOPICALLY ARRANGED
WITH
NOTES OF ENGLISH CASES AND ANNOTATIONS**

**PREPARED AND EDITED
BY
WALTER J. EAGLE**

VOL. XI

**NEW YORK
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1901**

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PREFACE.

This volume (11 AMERICAN NEGLIGENCE CASES) comprises the cases relating to the important topics of COLLISIONS and CROSSINGS, under which heads several subdivisions have been made, covering ACCIDENTS AT CROSSINGS AND ON RAILROAD TRACKS; COLLISIONS BETWEEN TRAINS AND VEHICLES; COLLISIONS BETWEEN TRAINS AND STREET CARS; COLLISIONS ON STREET CAR TRACKS; INJURIES TO PEDESTRIANS; PASSENGERS INJURED IN COLLISIONS; TRESPASSERS ON TRACK; INJURIES TO CHILDREN ON TRACK; EMPLOYEES INJURED IN COLLISIONS; DEFECTIVE TRACKS; HORSES FRIGHTENED BY NOISE OF TRAINS; ANIMALS ON TRACK INJURED OR KILLED IN COLLISION WITH TRAINS, ETC. The cases have been chronologically arranged and grouped in alphabetical order of States, and cover the decisions, on the topics treated, from the earliest period to 1897.

The cases reported herein are those decided in the highest courts of ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DAKOTA, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, and MAINE; together with ANNOTATIONS AND NOTES OF ENGLISH CASES.

In addition to the cases reported several SPECIAL NOTES have been added, which, it is hoped, will materially aid the practitioner on various points of the law of NEGLIGENCE, namely: NOTE ON CONTRIBUTORY NEGLIGENCE IN CROSSING RAILROAD TRACK; STATUTORY REGULATIONS AS TO SPEED OF TRAINS AT CROSSINGS; DEGREES OF NEGLIGENCE; DOCTRINE OF THOROGOOD *v.* BRYAN; IMPUTED NEGLIGENCE; RIGHT OF WAY ON STREET CAR TRACKS; PRESUMPTION OF NEGLIGENCE IN LIVE-STOCK KILLING CASES; LIABILITY FOR INJURIES TO ANIMALS ON TRACK; ORDINANCES RELATING TO SIGNALS AT CROSSINGS;

RAILROAD RULES AND REGULATIONS; LIABILITY OF OWNER FOR TORTS OF PERSONS EMPLOYED ON HIS LAND; ETC. Numerous CROSS-REFERENCES to topics of Negligence law are given throughout the volume. A complete list of the NOTES appears at the end of the TABLE OF CASES REPORTED.

A reference to the TABLE OF CASES CLASSIFIED, which precedes the INDEX, will enable the reader to see, at a glance, the causes of action and the injuries sustained in the cases reported in this volume.

Especial attention has been given to the INDEX, which is so arranged that the practitioner, in his search for points on particular subjects, may not be delayed by directions to cross-references. The cases and points indexed are placed under duplicate heads, avoiding cross-references, making the INDEX a ready guide to a case in point.

The mass of material relating to COLLISIONS AND CROSSINGS renders it necessary to condense the same, and, wherever convenient, notes and abstracts of cases on the topics treated have been made, thus enabling the subject to be reported within reasonable compass.

VOLUME 12 will contain the cases in the States not reported in this volume, and will complete the topic "Collisions and Crossings."

WALTER J. EAGLE.

NEW YORK, *October, 1901.*

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AMERICAN NEGLIGENCE CASES.

GEORGIA PACIFIC RAILWAY COMPANY v. HUGHES.

Supreme Court, Alabama, December Term, 1888.

[Reported in 87 Ala. 610.]

CROSSING OF RAILWAYS—COLLISION OF TRAIN WITH STREET RAILWAY CAR—INJURY TO PASSENGER—JOINT TORT FEASORS.

— Where railway trains collide at crossing of roads, the fact that the negligence of the road on which plaintiff was a passenger contributed proximately to the injury, will not defeat a recovery against the other road where each road was guilty of negligence which caused, or contributed in causing, the injury. It may create a joint and several liability; it does not exonerate either (1).

SAME—NO CONTRIBUTORY NEGLIGENCE—NO LIABILITY.— In such a case if the accident is due entirely to the negligence of the road on which the plaintiff was a passenger there can be no recovery by him against the other road for damages sustained (2).

1. A perusal of the indices to vols. 1-10 AM. NEG. CAS., will disclose references to many collision cases in which passengers have been injured, the same being reported under the topic of liability of carriers for injuries to passengers on trains, street cars, etc., decided in the various States, from the earliest period to 1897. The *Alabama* cases will be found in vols. 2 and 9 AM. NEG. CAS. Accidents to employees arising out of collisions or at crossings will be reported under the title of Master and Servant, when that topic is reached in

the series of AM. NEG. CAS., but notes of such cases will be found throughout vols. 11 and 12. Collisions with animals on track, not involving injuries to persons will be treated in notes in vols. 11 and 12 AM. NEG. CAS.

Collision and Crossing cases, from 1897 to date, are reported in vols. 1-9 Am. Neg. Rep., a series of Reports which gives all the current cases arising out of Negligence.

2. See the case next reported in this volume.

SAME — STATUTORY LIABILITY — BURDEN OF PROOF. — Under Alabama Code, secs. 1144, 1145 and 1147 (note), in an action to recover damages for personal injuries sustained, the onus is on the railroad company to acquit itself of negligence, by showing, 1, a compliance with the statutory requisitions as to blowing the whistle and ringing the bell; or, 2, that such compliance could not have averted the injury; but this statutory rule does not extend to a case where the injuries are caused by a neglect of other duties at a crossing of two railroads, resulting in a collision whereby plaintiff, a passenger, was injured.

SAME — CASES EXPLAINED AND LIMITED. — In the following cases, presenting questions arising under sec. 1144 (Code of 1886), "the decisions were correct on the points presented, but the principle was stated too broadly, and is liable to mislead: Ala. Gt. So. R. R. Co. v. McAlpine, 75 Ala. 113; s. c., 80 Ala. 73; So. & N. R. R. Co. v. Bees, 82 Ala. 340; M. & G. R. R. Co. v. Caldwell, 83 Ala. 196; and in Louis. & Nash. R. R. Co. v. Jones, 83 Ala. 373, 9 Am. Neg. Cas. 5, the principle stated was scarcely called for, and is not correct when applied to the class of injuries there complained of."

APPEAL from the Circuit Court of Jefferson.

Action against the appellant corporation, to recover damages for personal injuries sustained by plaintiff from a collision of a street railway car, on which he was a passenger, and a train of cars belonging to the appellant. The collision occurred at the intersection of two streets in the city of Birmingham, where the tracks of the two railroads crossed each other. The court charged the jury, among other things, as follows: "When a person sues a railroad company for damages for injuries to his person, as in this case, he is required to show that he has been injured, and that the injury was inflicted by the defendant, or the defendant's employees or servants; and when he does that, the burden of proof is on the defendant to show that itself or its employees were not negligent at the time and place of the occurrence, and therefore, if the plaintiff was injured at all, he was not injured by reason of the defendant's negligence." The appellant excepted to this charge, and assigned same as error. *Judgment reversed.*

JAMES WEATHERLY, for appellant.

SMITH & LOWE, for appellee.

Stone, Ch. J. — The East Lake Dummy Line of railway extends from the business part of the city of Birmingham, eastwardly to East Lake. It is a street railway, the cars of which are drawn by steam power, called a dummy engine. Within the corporate limits of Birmingham, at the intersection of First avenue and Twenty-seventh street, the East Lake railway track

crosses two lateral tracks of the Georgia Pacific Railway Company that were used in receiving and transferring cars from and to other railroads that center in Birmingham. The railroad crossings are in a public street, or at the point of intersection of the two streets. At this crossing the injury was suffered, which gave rise to the present suit. The injury was inflicted in March, 1888.

The plaintiff, Hughes, was a passenger on the dummy line, going eastward. While crossing the Georgia Pacific's said tracks a collision occurred between the coach in which he was riding and the front car of a train which the Georgia Pacific was pushing along its transfer track, with a view of placing said cars, some ten in number, beyond the crossing. The engine of the Georgia Pacific, which was moving these cars, was at the other end of the train, about ten car lengths distant — say three hundred feet — from the crossing. Plaintiff, as the proof tends to show, was seriously hurt and injured, and it is not claimed that he was himself guilty of any negligence. The testimony as to the cause, or proximate cause of the collision, is in very marked conflict. The one line of proof, if true as presented, relieves the dummy line of all omissions of duty — of all negligence — and places the fault on the Georgia Pacific. The other places the culpability on the dummy line. Neither the court below, nor this court, was or is charged with the ascertainment of the facts. That was exclusively the province of the jury, under proper instructions as to the law, to be given to them by the court. We review the Circuit Court's rulings on the law, and nothing else.

A few questions were reserved on the admissibility of the evidence. They were not pressed in the argument, and we think there is nothing in them.

The defense takes two positions. First: That conceding the Georgia Pacific was guilty of negligence, the dummy line was also guilty of negligence, which contributed proximately to the collision; and plaintiff being a passenger on the dummy line, is under the same disability to sue and recover as the dummy line would be if it were suing. There are some authorities which support this view, but we think them unsound. If each of the corporations was guilty of negligence, which caused, or aided in causing the injury, certainly it is a strange logic to contend that, because each had an assistant in committing the tort, neither is

liable to the person injured by such compound tort. *Western R'y of Ala. v. Sistrunk*, 85 Ala. 352; 2 Wood's Railway Law, 1340 *et seq.*; *Chapman v. New Haven R. Co.*, 19 N. Y. 341, 9 Am. Neg. Cas. 618n; *Robinson v. N. Y. Cent. R. Co.*, 66 N. Y. 11; *Shear. & Redf. Neg.*, § 46; *Whart. Neg.*, § 395; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364, 12 Am. & Eng. R. Cas. 166; *Patt. Acc. Law*, § 357. It may create a joint and several liability. It does not exonerate either.

The other defense relied on is that the entire fault was that of the dummy line. If that be true, there should be no recovery against the Georgia Pacific. The only form in which this question comes before us is in the charges given and refused; notably, the charges relating to the burden of proof.

The act "to define the duties and liabilities of railroad companies in this State," was approved February 6, 1858. *Sess. Acts*, 1857-8, p. 15. The third section of that act was amended January 31, 1861. *Sess. Acts*, 37. As amended, the first and third sections were carried into the Code of 1867 as sections 1399, 1401. They were then carried, without change, into the Code of 1876 as sections 1699 and 1700. These sections remained without change until February 28, 1887, when section 1700 was amended. *Sess. Acts*, 146-7. Section 1699 of the Code of 1876 was carried, without any alteration which affects this case, into the Code of 1886 as section 1144. The act of February 28, 1887, which amended section 1700 of the Code of 1876, was not repealed, or affected in any manner, by the adoption of the Code of 1886. Such is the express language of the second section of the act "to adopt a code of laws for the State of Alabama," approved February 28, 1887. *Sess. Acts*, 47. It results that the statutory law which governs this case is found in sections 1144 and 1145 of the Code of 1886, and in "the act to amend section 1700 of the Code," approved February 28, 1887. *Sess. Acts*, 146.

Section 1144, Code of 1886, specifies many duties which "the engineer, or other person having control of the running of a locomotive on any railroad," must observe and perform. We will only mention those which seem to be applicable to this case: "He must also blow the whistle, or ring the bell, at short intervals, on entering into, or while moving within, or passing through any village, town or city. He must, also, on perceiving any obstruction on the track, use all the means within his power, known to skilful engineers, such as applying brakes, and reversing

engine, in order to stop the train." § 1145. "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop, within one hundred feet of such crossing, and not to proceed until they know the way to be clear; the train on the railroad having the older right of way being entitled to cross first."

Before the amendment of section 1700, by the act of February 28, 1887, when suit was brought against railroad companies, for destruction or injury of stock or other property by their locomotives or cars, the burden of proof was declared to be on the railroad company, to show that the requirements of section 1699 of that Code were complied with, at the time and place when and where the injury was done. There was no such declaration or provision applicable to suits in which injury to the person was the ground of complaint. The requirements of section 1699, here referred to, are found in section 1144 of the Code of 1886, from which we have given extracts above. The amendment of section 1700 extended its provisions so as to include cases in which a person was killed or injured; and, as the statute stood when the plaintiff in this case was injured, and is still of force, the rule as to the burden of proof was and is still the same, whether the injury complained of is to person or property. The amended section is in the following language: "A railroad company is liable for all damages done to persons, stock or other property, resulting from a failure to comply with the requirements of the preceding section, or any negligence on the part of such company or its agents; and when any person or stock is killed or injured, or other property damaged or destroyed by the locomotive or cars of any railroad, the burden of proof in any suit brought therefor is on the railroad company, to show that the requirements of the preceding section (1699 of the Code of 1876) were complied with, at the time and place when and where the injury was done."

Railroads are common carriers for hire, and as such, when they transport property, and it is injured in transit, or is not delivered, the burden is on the carrier to show that it bestowed all proper diligence on the service, and that the property was injured or destroyed without any negligence on its part. *Steele v. Townsend*, 37 Ala. 247; *Leach v. Bush*, 57 Ala. 145; *Grey v. Mobile Trade Co.*, 55 Ala. 387. When the injury is to a

person, or to property not being transported, then the statutes referred to above become important factors. We have had many cases before us which were more or less influenced by these statutes. Whenever an injury has been done to property under circumstances which call for the exercise of any of the cautionary signals or acts required by section 1144, Code of 1886, we have held that the burden is on the railroad company to prove that it complied with the requirements of that section. We have held, however, that a failure to comply, or, what is the same thing, to make proof that it did comply, while it creates a *prima facie* intendment that the railroad was in fault, is not conclusive of the plaintiff's right of recovery. It is only in cases where the injury complained of is reasonably traceable to the failure to comply with the requirements of the statute, that the failure, *per se*, gives a right of action. And we have held further, that if, when the danger became visible, any appliances would have been powerless to avert the catastrophe, then it is not actionable negligence, if nothing be attempted. In each of these varying phases of defense, the burden is on the railroad company; that is, the burden is on it to prove that it complied with those requirements which were applicable to the case or crisis it had to deal with, or to show that none of those requirements could have availed to avert the injury. We have said the impossible need not be attempted. We subjoin a citation of most of our rulings, which, under the amended statute, are now alike applicable to each class of injury — that to person, as well as that to property: *M. & O. R. Co. v. Williams*, 53 Ala. 595; *Mobile & M. R. Co. v. Blakeley*, 59 Ala. 471; *M. & C. R. Co. v. Copeland*, 61 Ala. 372, 9 Am. Neg. Cas. 31n; *So. & N. R. Co. v. Thompson*, 62 Ala. 494; *Central R. & Banking Co. v. Letcher*, 69 Ala. 106, 2 Am. Neg. Cas. 5; *A. G. S. R. Co. v. McAlpine*, 71 Ala. 545; *E. T., V. & G. R. Co. v. Bayliss*, 74 Ala. 150; *S. C.*, 77 Ala. 429; *Clements v. E. T., V. & G. R. Co.*, 77 Ala. 533; *E. T., V. & G. R. Co. v. Deaver*, 79 Ala. 216; *E. T., V. & G. R. Co. v. King*, 81 Ala. 177; *Ga. Pac. R. Co. v. Blanton*, 84 Ala. 154; *A. G. S. R. Co. v. Smith*, 85 Ala. 208; *Western R'y Co. v. Sistrunk*, 85 Ala. 352; *N. C. & St. L. R. Co. v. Hembree*, 85 Ala. 481; *L. & N. R. Co. v. Reese*, 85 Ala. 497; *S. & N. R. Co. v. Williams*, 65 Ala. 74; 3 Brick. Dig. 726.(1)

1. Several of these cases will be cases in this volume, *post*, either in found reported among the Alabama notes or abstracts of cases.

The following cases presented questions arising under section 1144 of the Code of 1886. The decisions were correct on the points presented, but the principle was stated too broadly, and is liable to mislead, if it has not already done so: *Ala. Gt. So. R. Co. v. McAlpine*, 75 Ala. 113; *S. C.*, 80 Ala. 73; *S. & N. A. R. Co. v. Bees*, 82 Ala. 340; *M. & G. R. Co. v. Caldwell*, 83 Ala. 196. In *Louis. & Nash. R. Co. v. Jones*, 83 Ala. 373, 9 Am. Neg. Cas. 5, the principle stated was scarcely called for, and is not correct when applied to the class of injury complained of in that case.

It is not our intention to modify the doctrine declared in *Sav. & Memp. R. Co. v. Shearer*, 58 Ala. 672; and *S. & N. A. R. Co. v. Sullivan*, 59 Ala. 272; nor to weaken the authority of the principle declared in *Tanner v. L. & N. R. Co.*, 60 Ala. 621, further than that case may be qualified by *M. & C. R. Co. v. Womack*, 84 Ala. 149.

There is no case in our books which declares, clearly and specifically, to what extent, in cases like the present, the burden is on the railroad company to acquit itself of imputed negligence. The question has not heretofore been pressed upon our attention as it is in this case. Sections 1144 and 1145 each defines certain duties which railroad companies must observe. And we have declared it their duty, when backing their trains within a city, town or village, to maintain a lookout, which can survey and take in that portion of the track which their train is being pushed upon. This, for the safety of persons who might perchance be on the track. A disregard of any one or more of these duties would be negligence in the railroad company; and if injury to person or property resulted from it, and there was no concurring, proximate, contributory negligence on the part of the injured party, a suit can be maintained for damages resulting from such negligence. But, on whom, and to what extent, rests the burden of proof in such action?

We have seen that, under section 1700 of the Code of 1886, as amended, the burden is expressly placed on the railroad company to show it complied with the requirements of section 1699, Code of 1876 — section 1144, Code of 1886. It fails to mention any other duty, or to cast the burden of proving it on the railroad company. It thus, by its silence, fails to place the burden of proof on the railroad company, in the matter of its compliance with section 1145, Code of 1886, and in the matter of maintaining

a lookout, when it backs a train within the limits of a city, town or village. In fact, it is silent as to all matters of imputed negligence, save the disregard of the duties enjoined in section 1144 of the Code. This is significant. *Expressum facit cessare tacitum*. It is a rule of interpretation, that if a statute enumerates and commands certain duties, or specifies and declares certain exceptions, the implications are, that everything not enumerated or specified is left without the influence of the statute. Sedg. Stat. Constr. (2d ed.), 31, note. In 2 Am & Eng. Encyc. Law it is said: "The burden of proof is, in general, upon the plaintiff, of showing, in a case of personal injury, negligence on the part of the carrier." This is the rule in the absence of the statute.

We feel constrained to hold, that the burden of proof was on the railroad company, only to the extent the statute places it — that is, as to all the matters enumerated in section 1144 of the Code; and if it seeks to excuse itself for a non-compliance with those requirements, then the burden is on it to show a state of facts which, under our rulings, will excuse it from making the attempt. As to all other matters raised by the issue, the burden is primarily on the plaintiff. But, the measure of proof required of him is graded by the issue it seeks to maintain. If it involves a negative — such as, that the train was not brought to a full stop within 100 feet of the crossing, or that it did not maintain a proper lookout to avert danger — then the rule of proof in such case is not so exacting. He must, however, in the first place, offer some testimony of the non-observance of the duty, before the defendant need offer any proof of its observance. When this primary proof is made by plaintiff, it then becomes a question of inquiry by the jury on the entire testimony before them. On the general subject of the burden of proof in suits like this, see 2 Wood's Railway Law, 1096, and note.

Under the principles we have declared, the first paragraph of the charge given by the court to the jury, to which exception was reserved, misplaced the burden of proof; and for that error, the judgment of the Circuit Court must be reversed. *Thompson v. Duncan*, 76 Ala. 334, 9 Am. Neg. Cas. 1.

We need not consider the other charges. What we have said will be a sufficient guide on another trial.

Reversed and remanded.

**RICHMOND AND DANVILLE RAILROAD
COMPANY v. GREENWOOD.**

Supreme Court, Alabama, November Term, 1892.

[Reported in 99 Ala. 501.]

COLLISION OF TRAINS AT CROSSING — JOINT TORT FEASORS — JOINT LIABILITY. — Where an action is brought against two or more defendants, seeking to hold them liable as joint tort feasors, responsible jointly and severally for the resulting injury, judgment may be properly rendered against one of the defendants and in favor of the other (1).

MOTION FOR PHYSICAL EXAMINATION MUST BE SEASONABLY MADE. — A motion to require the plaintiff to submit to a physical examination must be seasonably made; and will not be granted where the result would be an unreasonable postponement of the trial, or it would necessitate the plaintiff's presence in Alabama, when it appears that he was not reasonably equal to the journey from his home in a distant state.

TRIAL — STRUCK JURY. — When an action is against two defendants, and each of the defendants demands a struck jury, under sec. 2752, Ala. Code, they are not entitled to separate panels.

DEPOSITIONS ON INTERROGATORIES — EXCEPTIONS MUST BE FILED. — Where depositions of witnesses are taken on interrogatories to which no objections are filed, the answers, if responsive, cannot be objected to during the trial.

COLLISION OF RAILROAD TRAINS AT CROSSING — PUNITIVE DAMAGES. — In an action against two railroad companies for injuries caused by a collision at a railroad crossing, where the evidence tends to show that the speed of one of the trains at the time of the accident was thirty or forty miles per hour; that such train was not brought to a full stop near the crossing, as required by statute, nor its speed slackened on approaching such crossing; and that the engines of both trains were in plain view when the rapidly moving engine was 150 feet away from the crossing, the jury is justified in finding that there was wantonness, wilfulness, and reckless indifference to probable consequences on the part of the engineer on such engine; and in such a case the question of punitive damages is properly submitted to the jury.

KNOWLEDGE OF DANGER BY ENGINEER — NOT NECESSARY TO RECOVER PUNITIVE DAMAGES. — An engineer, familiar with the location of the crossing of his road by another road, and that the physical conformation of the locality prevents his seeing trains on the other road until too close to prevent a collision, unless he has complied with the statute requiring all trains to stop within 100 feet of the crossing, who neglects to stop as required by statute, but runs his train upon the crossing without slackening its speed of thirty to forty miles per hour, and a collision ensues, is guilty of such wanton and reckless conduct as imposes upon the railroad the liability for punitive damages, although he may have had no actual knowledge of the approach of the train on the other road.

1. See the preceding case reported in this volume

CARRIERS OF PASSENGERS — RAILROADS — CARE AND DILIGENCE REQUIRED. — Railroad companies, engaged in the carriage of passengers, and their employees, are required to exercise the highest degree of care, diligence and skill known to careful, diligent and skilful persons engaged in such business.

TRAINMEN — DUTY AT CROSSING. — Trainmen stopping at a crossing in obedience to the statute, must make every effort that the highest degree of care, skill and diligence requires, to be sure the way is clear before proceeding and will remain so long enough for the passage of their train over the intersecting road; this duty is not performed when, before proceeding, the engineer is only "reasonably sure the way is clear," or has simply "endeavored, in good faith, to ascertain whether or not the way is clear."

TRAINMEN'S RIGHT TO ASSUME COMPLIANCE WITH STATUTE BY THE EMPLOYEES OF AN INTERSECTING ROAD. — Trainmen on one road, who have complied with the statute in approaching a crossing, may assume that trainmen on the intersecting road will also comply therewith, and a charge to that effect is not objectionable, as ignoring a duty which might have arisen after the train that complied with the statute had started, when given in connection with the further instruction, that the train that stopped had not the right to proceed over the crossing if the circumstances indicated that the other train would not stop.

APPEAL from the City Court of Birmingham. *Judgment reversed.*

"Action brought by J. T. Greenwood, the appellee, against the appellant, the Richmond & Danville Railroad Company, and the Savannah & Western Railroad Company, to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on a train of the Richmond & Danville Railroad Company, by reason of a collision between trains of the defendants.

"The pleadings are sufficiently stated in the opinion. The facts are as follows: On December 24, 1889, the plaintiff was a passenger on one of the regular passenger trains of the Richmond & Danville Railroad Company. Where the track of the Richmond & Danville road crosses the track of the Savannah & Western road, there was a collision between the passenger train on which the plaintiff was riding and a freight train on the Savannah & Western Railroad. The tracks crossed each other at this point at an acute angle. The engineer of the passenger train was in his seat on the right of the engine, the fireman was putting coal in the engine, and a flagman, who had gotten on the engine, was sitting in the fireman's seat. The engineer and fireman of the freight engine were in their proper seats. The collision occurred in the daytime. There was an embankment

on the west or north side of the Richmond & Danville track intervening between the two tracks and obstructing the view to some extent. This embankment was about thirty or forty feet high at a distance of 200 or 300 feet up the Richmond & Danville track, and gradually declined to a distance of about eleven feet high as it approached the crossing. There was a stop-post within a few feet of the Richmond & Danville track, and about 100 or more feet from the crossing, to indicate where trains should stop on approaching said crossing. There was a similar stop-post near the Savannah & Western track, about seventy-five or eighty feet from the crossing. No person on the Richmond & Danville engine actually saw or heard the approaching Savannah & Western train, until after the latter train had approached so near the track of the Richmond & Danville Railroad that the said Richmond & Danville engine could not be stopped by the use of all possible means for that purpose.

“ The trial of the cause was begun for February 5, 1892. On January 28, 1892, the Richmond & Danville Railroad Company entered on the motion docket a motion ‘ to grant an order directing and requiring the plaintiff in this case to appear in person at the trial of the case, and to submit his person to a physical examination by medical experts to be nominated by the court, or selected by the parties or their attorneys.’ The grounds of the motion were, that the plaintiff was a resident citizen of Texas and sues to recover a large sum of money for personal injuries alleged to have been sustained by him while on the defendant’s train; that he claims to have sustained permanent injuries in his head, spine, back and limbs, internal organs and nervous system; and that he has taken steps to have his own deposition taken, and the depositions of a large number of witnesses who reside in Georgia and Texas, so that defendants will be deprived of the opportunity to examine plaintiff and his witnesses face to face, and “ will not be able to view or exhibit to the jury the person of the plaintiff, so as to determine, with any degree of certainty, the truth or falsity of plaintiff’s claim of permanent injury or the truth or falsity of the testimony of plaintiff or his witnesses,’ and hence if the plaintiff does not appear at the trial in person gross injustice may be done to the defendant. The Richmond & Danville Railroad Company, in open court, offered to defray all the necessary and actual expenses arising from the granting of said motion. The court overruled the motion

because not seasonably made, and the said defendant duly excepted.

“ When the cause was called for trial, one of the regular juries being in the jury box, each of the defendants, separately and severally, demanded the right to have a struck jury, as provided by section 2752 of the Code of 1886. There were twenty-four regular jurors in attendance upon court. The sheriff furnished each of the defendants a list of the twenty-four jurors in attendance, and thereupon each of the defendants separately demanded that six more jurors be impaneled and added to the twenty-four jurors from which to secure a struck jury. The court refused the demand to add the six jurors, and the defendants separately excepted. Each defendant then separately objected to strike from the list of twenty-four jurors so furnished, and assigned as its reason therefor, “ that it was impracticable for each separate defendant to strike six men from said list of twenty-four.”

“ The Richmond & Danville Railroad Company separately excepted to the italicized portions of the following excerpts from the court’s general oral charge: 1. ‘ Now, you will notice, gentlemen of the jury, that there are two defendants here, and the plaintiff claims that both of them are liable, but if both of them are guilty of negligence, as I shall explain to you, then both of them are liable. *If one was guilty of negligence and the other was not, then the company that is guilty of negligence is liable, and the other is not.*’ 2. ‘ When the tracks of two railroad companies cross each other, the engineers and conductors must cause their trains to come to a full stop within 100 feet of said crossing, and not proceed until they know the way to be clear; trains on the railroad having the older right of way being entitled to cross first. *Now you will see from that, that if both roads had observed these precautions, it would be impossible for any collision to occur; each one coming up to within 100 feet of the crossing would stop and see that the way was clear and then proceed; it would be impossible for them to collide at the crossing. It would not be impossible, however, for a collision to occur when one road observes these precautions and the other does not. The managers, engineers and conductors of trains are not required to do impossible things. What they are required to do is to exercise that reasonable degree of care that men in their situations, prudently conducting railroads and governed by this statute, would conduct themselves under the*

circumstances. For instance, if one train comes up to a point which is within 100 feet of the crossing and observes these precautions, and sees whether or not the way is clear, and there is no train in such distance, and if it then proceeds along after having stopped, and another train should come rushing along, not having observed these precautions, and going so swiftly, or perhaps around a curve, so that its approach could not have been seen by this first train, and a collision occurred, why then, you see that the first train has been guilty of no negligence, because it exercised all the care that it could have exercised. They stopped and saw that the way was clear, and the negligence would be on the other train, that did not observe these precautions, having caused the collision. Now one road has a right to suppose in its conduct that another road is going to observe the proper precautions. So then I mention that to you to show you that one road may be liable and another may not be liable.' 3. 'You will consider whether or not either of the roads were guilty of any negligence. If neither of them were guilty of any negligence, why then there could be no recovery. If one of them was guilty of negligence, and the other was not, why then there should be no recovery against the one that was not guilty of the negligence.' 4. 'If both roads were guilty of negligence that contributed to the plaintiff's injury, then there should be but one verdict by you against both of the roads.' 5. 'If you believe that the plaintiff is entitled to compensatory damages, then you are to consider whether or not you will give him what is called vindictive damages, or punitive damages, which means punishment against the one they are imposed upon — are assessed for that purpose. They are in the nature of a punishment.' 6. 'Now, if simple negligence is proven, and only simple negligence is proven, then the damages could only be compensatory, but if wilful neglect or gross neglect is proven, then it is left to your judgment and discretion to say whether or not you will inflict punitive damages, that is damages to punish the defendant or defendants for the wilful disregard of the safety of other people.'

“The Richmond & Danville Railroad Company requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked. 1. 'There is no evidence in the case that the defendant, the Richmond & Danville Railroad Company, or its servants, were guilty of any wanton, reckless or intentional wrong, by which injury was inflicted upon the plaintiff.' 2. 'If the jury believe the

evidence, they must find for the defendant.' 3. 'If you believe the evidence in the case, you cannot assess any punitive damages against the defendant, the Richmond & Danville Railroad Company.' 5. 'The expression used in the statute relative to the duty of an engineer at a railroad crossing, that he must not proceed "until he knows the way to be clear," does not mean that the engineer, in all cases, must know the way to be clear with absolute certainty. It only means that the engineer must be reasonably sure that the way is clear; that is, when the fact and circumstances, existing at the time and within his knowledge, are such as would reasonably induce a prudent person, in like situation, to proceed over the crossing.' 6. 'The way over a railroad crossing is clear, within the meaning of this statute, if there is no obstruction on the crossing, or within actual sight or hearing of the engineer, before he proceeds to cross, if he has stopped the engine and attached train within 100 feet of the crossing, and endeavored, in good faith, to ascertain whether or not the way is clear.' 8. 'The defendant's engineer must have known that a train on the other defendant's road was approaching the crossing, otherwise he would not be guilty of wanton or reckless misconduct.' 9. 'Unless the defendant's engineer had actual knowledge of the impending peril of a collision at the crossing, he would not be guilty of such recklessness as would justify the imposition of punitive damages.'

"The court, at the request of the Savannah & Western Railroad Company, gave, among others, the following written charges to the jury: 5. 'If the jury shall find from the evidence that the Savannah & Western train, or those in charge of it, were guilty of an unintentional omission of duty, or of simple negligence merely, you cannot find a verdict against it under the first and second counts of the complaint.' 11. 'If the jury shall find that the proximate cause of the plaintiff's injury was the negligence of the Richmond & Danville Company, this is a circumstance for the jury to consider in determining whether the Savannah & Western Company was guilty of any negligence at all at the time of the collision.' To the giving of each of said charges the Richmond & Danville Railroad Company separately excepted.

"There was a verdict for plaintiff against the Richmond & Danville Railroad Company, assessing the damages at \$5,000. The Richmond & Danville Railroad Company moved the court

to give judgment in its favor, notwithstanding the verdict of the jury. on the grounds, that the cause of action stated in the complaint, was based on the joint wrong of both of the defendants, and that the verdict of the jury is in favor of the plaintiff and against the Richmond & Danville Railroad Company, and 'is, therefore, tantamount to, and operates as, an acquittal to the defendant, the Savannah & Western Railroad Company; that said finding and verdict is inconsistent with, and repugnant to, the averments of the complaint, and that, therefore, no judgment against the Richmond & Danville Railroad Company can be founded upon it.' Motion overruled, and the Richmond & Danville Railroad Company excepted to this ruling and prosecuted the present appeal."

JAMES WEATHERLY, for appellant.

DICKINSON & KERR, for appellee.

McOlellan, J. — This is an action by Greenwood against the Richmond & Danville Railroad Company and the Savannah & Western Railroad Company sounding in damages for personal injuries alleged to have been sustained by the plaintiff in a collision between trains of the respective railway companies, at a crossing of their respective tracks. The complaint contains three counts. The first and second aver that the collision was the result of negligence and wantonness, and the third count on simple negligence. Each of the three counts ascribes the injury complained of to the concurring wrong of both defendants. Thus the first count avers that the engine and train on the Richmond & Danville road belonged to, and were in charge of and being operated by servants of, that company; that the engine and train on the Savannah & Western road belonged to, and were in charge of and being operated by servants of, that company, and that these servants "carelessly, negligently, and wantonly ran the said engines and trains so under their charge, respectively, as aforesaid, into and against each other upon or near said crossing, and plaintiff was thereby, then and there thrown down and maimed, crushed and bruised," etc. The second count particularizes the negligence charged against the servants of the two defendants, averring it to have consisted on the part of the employees on each train, in a failure to sound the whistle and come to a full stop within 100 feet of the track of the other road, and in their proceeding to attempt the crossing without knowing the way was clear, and then continues: "And, by

reason of said negligence on the part of said defendants, the said engines and trains then and there collided with each other upon or near said crossing, and plaintiff was then and there thrown violently down and maimed, bruised, and otherwise injured, etc. And the third count is substantially the first, with the allegation of wantonness omitted. It avers that the injury complained of was caused by the negligence of the servants of both defendants.

It is to be observed that the complaint in each of its counts relies upon and seeks to recover on account of the separate and distinct wrongs of the defendants respectively. It seeks to enforce a joint liability for acts which were not joint in themselves, nor bound together by the tie of a common purpose. It is a very general, if not in principle a universal, rule that this cannot be done. The wrong done must be jointly done in fact by the defendants, or, if contributed to by each, a joint purpose must be imputable to them, before they can be said to be joint tort feorsors, and responsible jointly and severally for the resulting injury, as all joint tort feorsors are. It will not suffice, as a general proposition at least, that the separate wrongful acts or omissions of two persons, having no connection with each other, the motive of each being foreign to that of the other, have in their unintended coalescence and coaction produced an injury. Joint and several liability cannot ordinarily be affirmed upon such a state of case. An exception to this general doctrine was virtually declared by the Court of Appeals of New York in the case of *Colegrove v. N. Y. & N. H. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418, 9 Am. Neg. Cas. 618n, where it was held (Denio, J., dissenting) that a passenger injured by a collision resulting from the separate but concurrent negligence of two railroad companies may maintain a joint action against both. This case has been followed several times in New York, and by one or two cases in other States. See note to *Colegrove's Case*, 75 Am. Dec. 419. And its doctrine, in a modified form, is embodied in the text of *Am. & Eng. Encyc. of Law*, in this language: "Tort feorsors cannot be sued jointly unless the tort has been committed by their joint act, or they are jointly guilty of the negligence or breach of duty causing the injury." Volume 17, p. 602. The soundness of this exception to the general rule — for such it must be regarded — has been directly questioned, and is open to doubt. *Lull v. F. W. Imp. Co.*,

19 Wis. 100; Trowbridge *v.* Forepaugh, 14 Minn. 133; Larkins *v.* Moore & Echwurzel, 42 Ala. 322; Powell *v.* Thompson, 80 Ala. 51. Whether sound or not, however, we need not decide in this case. The complaint here alleges a joint and several liability of these defendants for the result of their separate and distinct but concurring and co-acting negligence. Its sufficiency was not tested by demurrer; but both defendants pleaded the general issue, thereby admitting its adequacy as a charge of joint tort against them, confessing, in other words, that if the separate negligence and the injury charged were proved they were jointly answerable in damages; and if jointly liable upon proof against each, it follows there was also a several liability resting on that one, if only one, against which the charge was established. The court therefore properly, on this state of pleadings, allowed the jury to acquit one defendant and bring in a verdict against the other; and hence, of course, there was no error in overruling the motion of the Richmond & Danville Company for judgment in its favor *non obstante veredicto*.

We shall not disturb the trial court's action on the motion to require the plaintiff to submit to a physical examination of his person. Under the circumstances the motion was not seasonably made; and to have granted it would probably have been to have postponed the trial when it might as well have been brought forward sufficiently early for this result to have been avoided. Moreover, it should not have been granted at all, if it would have necessitated the plaintiff's presence in Alabama, and it appeared that he was not reasonably equal to the journey from his home in Texas.

There was no error in the refusal of the court to allow separate panels from which to make up the struck jury demanded. *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448.

In support of the trial court's action in overruling defendant's motion to exclude certain answers of plaintiff's witnesses to interrogatories propounded to them by the plaintiff, it will suffice to say that the answers were responsive to the interrogatories, and no objections to the latter were ever interposed by the defendants. *Louis. & Nash. R. Co. v. Hall*, 91 Ala. 112, 119.

Moreover, none of the assignments of error addressed to the rulings below on the admission of testimony are insisted on in argument; and we will not further discuss those rulings.

There was evidence which afforded ground for an inference of wantonness, or reckless indifference to consequences, in the conduct of the engineer in charge of the Richmond & Danville train. Without stating the testimony in full on this point, it will be sufficient to recall that of passengers on that train to the effect, or tending to show, that its speed when approaching the crossing was from thirty to forty miles per hour, that it was not only not brought to a full stop near the crossing, as required by the statute, but that, to the contrary, its speed was not at all slackened in its approach thereto; and of the engineer and fireman on the Savannah & Western train, that the engines were in plain view of each other, when that of the latter train was about to go on the crossing, and that of the Richmond & Danville was 150 feet away. If this testimony was true, and its truth was a question for the jury, the inference is readily, if not obviously, deducible that the Richmond & Danville engineer took the desperate chance either of passing the crossing before the immediately approaching engine on the other road reached it, or, if that engine was already there, the equally desperate chance of its being backed off before his engine reached the crossing. In either event, assuming the Richmond & Danville engineer to have been a sane man, the conclusion that he must have then had in his mind the probable consequences of his wrongful omission to make any effort to stop or to slacken the speed of his train is certain and inevitable. If the jury reached this conclusion, as upon the evidence it was open to them to do, the case involved every element of that wantonness, wilfulness or reckless indifference to probable results necessary to the imposition of punitive damages. The court's charge *ex mero motu* on this part of the case, and its refusal to give charges 1 and 3 requested by the Richmond & Danville Company, were free from error.

On the other hand, there was evidence going to show that the engineer did not *know* the Savannah & Western train was upon or approaching the crossing and had not *actual knowledge* of the impending peril of a collision in time to avert it by a resort to all possible preventive effort. And the question raised by the trial court's refusal to give charges 8 and 9 requested for the Richmond & Danville Company is whether, if this evidence is true, its engineer could be guilty of wantonness, or the like. It was settled in Lee's Case and again in Webb's Case that the

knowledge of danger upon which, in connection with the absence of subsequent diligence to avoid its consequences, a charge of wantonness might be sustained, need not be that which is presently acquired through the physical senses; the party charged need not on the particular occasion see or hear, or through other senses become advised of, the actual presence of every element necessary to constitute the danger that really exists. If, as was in effect declared in those cases, he knows of a crossing where people are wont to be in such numbers and with such frequency, a fact also known to him, as that to run a train along there with such great speed as not to be readily controlled and which might not admit of the escape of persons crossing the track, his conduct, he having in mind that he was approaching such a place, would authorize the imputation of wantonness, wilfulness or reckless indifference to consequences, though in point of actual fact he did not in the particular instance know of the presence of persons in exposed positions. *Ga. Pac. Ry. Co. v. Lee*, 92 Ala. 262; *Louis. & Nash. R. Co. v. Webb*, 97 Ala. 308 (1).

Tendencies of the evidence in the case at bar bring it, in our opinion, within the doctrine just stated. The engineer knew the location of the crossing. He knew that he was approaching it, for, according to all the evidence, he sounded the whistle of the locomotive with reference to it. He knew that trains on the other road were liable at any time to be on the crossing, and unable to pass clear of it after the two trains were in view of each other, or might at any time be approaching the crossing, without the ability to stop short of it, after seeing a train rapidly approaching it on his road, and that such other trains had the same right as his to approach and be on the crossing. He was advised by the statutory rule, of which he was presently aware, of the exceeding great danger of rushing headlong onto the crossing in violation of it; and a visible sign was there to admonish him of the point beyond which, in every instance, it was unsafe for him to go without stopping, and ascertaining the way to be clear. And he knew, also, of that physical conformation of the locality which obscured one road from the other, and trains on them from each other, until they were so near together in approaching the crossing as that, unless the statute

1. See these cases reported among *post*, and references to them in several the Alabama cases in this volume, of the notes to the Alabama cases.

had been complied with, trains going even at an ordinary rate of speed would inevitably collide. The jury, finding the truth of these tendencies of the evidence, and further finding, as it was open to them to do, that this engineer, with all of this in his mind, hurled his train at a great speed upon the crossing, not even slackening its pace of thirty or forty miles an hour, were authorized to conclude that he had that consciousness of the perilous character of the situation, and of his own conduct with reference thereto, which is an essential element of wantonness and the like, though they might also have believed that he had no actual knowledge of the approach of the Savannah & Western train. Charges 8 and 9 were therefore misleading, and well refused.

The plaintiff being a passenger on the colliding train of the Richmond & Danville Company, its employees, and, among the rest the engineer, owed him the duty of exercising the highest degrees of care, diligence, and skill in conservation of his safety, and the company was responsible in damages to him for the slightest negligence on the part of its servants resulting in injury to him. *M. & E. R. Co. v. Mallette*, 92 Ala. 209; *A. G. S. R. Co. v. Hill*, 93 Ala. 514, 9 Am. Neg. Cas. 11. Care and diligence such as a reasonable and ordinarily prudent person would exercise is, in legal contemplation, reasonable and ordinary care and diligence. It is not that highest — that utmost — degree of care and diligence and skill which the law exacts of the carriers of passengers. Nor is conduct actuated by good faith, and an honest purpose to avoid injury to passengers, the equivalent of the highest care, or even necessarily of ordinary care. It is not what a man sincerely intends doing, and does with sincere purpose to a given end, that determines whether, in doing it, he has exercised the care demanded by the situation, but the inquiry is to be resolved upon a further consideration of his acts themselves. A negligent act is none the less negligently performed because of the good faith which characterizes it. It may be that trainmen, on stopping for a crossing, are not required to *know* with absolute certainty in any case that the way is clear before proceeding; but, at least, when the lives of passengers are at stake, they must actually make every effort that the highest degree of care, skill, and diligence requires to be sure that the way is clear and will remain so sufficiently long for the safe passage of a bisecting road. That they may have done all *they thought*

necessary for assurance will not suffice; they must have done all that the dictates of the utmost care would have suggested to be done. Charges 5 and 6 requested for the Richmond & Danville Company are faulty when brought to the touch of these considerations. They were, moreover, especially misleading in view of a tendency of the evidence to show that a train, at the "stop-post" of the Savannah & Western road, could not be seen by the engineer from his position at the "stop-post" of the Richmond & Danville road. There was no error committed in refusing them. That trainmen of one road, who have complied with the statute, on approaching a crossing, have a right to assume that trainmen on the other road will also comply with it, in the absence of any indication that they cannot or will not, has been expressly decided by this court in a recent case. The general charge of the court on this subject is not open to the objection presented by the exception thereto, that it ignores a duty which might have arisen upon circumstances transpiring after the train has started after complying with the statute. That matter is accommodated in the further declaration, not included in the language marked by the exception, but a part of the charge on the same point, and to be considered along with every other part, to the effect, by necessary implication, that the first train has not the right to proceed over the crossing if the circumstances indicate that the other train will not stop. *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187.

Charge No. 11 given at the request of the Savannah & Western Company assumes that the Richmond & Danville Company was guilty of negligence, and submits to the jury the inquiry only as to whether its negligence was the proximate cause of the injury. The question of negligence *vel non* on the part of the Richmond & Danville Company was severely litigated before the jury on parol testimony. It was solely the jury's province to determine that question. The charge under consideration was invasive of the jury's exclusive prerogative to find either that that company was or was not guilty of the negligence charged. The giving of it was erroneous. *Cary v. State*, 76 Ala. 78; *Sandlin v. Anderson, Green & Co.*, 76 Ala. 403; *Joyner v. State*, 78 Ala. 448; *Carter v. Chambers*, 79 Ala. 223; *Jones v. Field*, 83 Ala. 445. The judgment of the City Court is reversed, and the cause will be remanded.

ENSLEY RAILWAY COMPANY v. CHEWNING.

Supreme Court, Alabama, November Term, 1890.

[Reported in 93 Ala. 24.]

PLEADING — FAILURE TO SHOW RELATIONS OF PARTIES. — Where the complaint, in an action against a railway company to recover damages for personal injuries, does not show the relationship between the parties, it will be presumed that plaintiff is a trespasser, and in such case it must be shown that the injury was caused recklessly, wantonly, or intentionally.

DUTY OF RAILROAD COMPANY TO PROVIDE PLATFORMS AND FURNISH LIGHTS AT NIGHT-TIME FOR CONVENIENCE OF PASSENGERS. — It is the duty of a railroad company to provide safe and convenient modes of ingress and egress to and from its cars, and to have the place for receiving and discharging passengers properly constructed for such purpose, and to provide platforms, or other safe and suitable substitute, necessary to the due performance of such duty; also, to furnish lights when trains arrive or depart in the night-time.

FAILURE TO SIGNAL NEGLIGENCE *PER SE*. — Failure of a railroad company to give cautionary signals, or keep a proper lookout at such times and places, as provided by statute (Code, sec. 1144), is negligence *per se*, entitling a person injured, who uses due care to avoid injury, to a claim for damages.

SPEED OF TRAIN — WHEN NOT RECKLESS. — It cannot be assumed that running a train at the rate of seven or eight miles an hour, which could be stopped within fifteen or twenty feet, is reckless.

PASSENGER STRUCK BY TRAIN — CONTRIBUTORY NEGLIGENCE. — Where it appeared that plaintiff, having been a passenger on one of defendant's trains, while waiting at a stopping place for a train on a branch road, thirty feet beyond the switch, was struck by a train, and the headlight of the approaching engine could have been seen by him more than 200 feet away had he looked in that direction, but plaintiff only looked in one direction, although the train was overdue and he was expecting it, it was held that plaintiff was guilty of contributory negligence precluding recovery (1).

1. On the second trial of this case, there was a verdict and judgment for defendant, which, on appeal, was affirmed. *Chewning v. Ensley R'y Co.*, 100 Ala. 493. In discussing the appeal COLEMAN, J., said: "Nearly every material question presented by the present record was adjudicated on a former appeal of the case. *Ensley R'y Co. v. Chewning*, 93 Ala. 24. Upon the facts presented, this court then held, that as a matter of law the plaintiff was guilty of contributory negligence. On the last trial, from which this appeal is prosecuted, the trial court charged the jury as a matter of law, that plaintiff was guilty of contributory negligence, and the correctness of this charge involves the material question at issue. All the evidence upon this aspect of the case, except that given by plaintiff himself, shows that he was guilty of such contributory negligence as to defeat any recovery, and it is to be considered whether the variance in his own testimony on this trial from that given at the former, if credited, would authorize a jury to infer a contrary conclusion. On the former trial the plaintiff testi-

APPEAL from the City Court of Birmingham.

"This action was brought by G. A. Chewning against the appellant corporation, to recover damages for personal injuries, which necessitated the amputation of one of plaintiff's arms; and was commenced on the 27th February, 1890. The jury awarded the plaintiff \$2,500 damages. There are forty-eight assignments of error, founded on adverse rulings of the court below on the pleadings and evidence. charges given, and the refusal of charges asked; but the points decided by this court do not require a statement of these matters in detail." *Judgment reversed.*

fied that he was awaiting defendant's train to take passage and had been standing on defendant's track for a minute or a minute and a half, and was looking in a contrary direction, when he was struck by the engine. On the present trial he testified that he had not been standing more than 'fifteen seconds before he was struck;' 'that he did not know he was on the cross-ties;' 'and that he had stepped back *unconsciously*,' when he was struck. A considerable portion of the argument is based upon the use of the word 'unconsciously' by the witness. When construed in connection with the other facts of the case and with plaintiff's own testimony, this word thus used is synonymous with 'absent-mindedness,' 'forgetfulness,' 'inadvertence.' It is conclusively proven and admitted by plaintiff, that he was perfectly familiar with the location of defendant's track, and the stopping place of the train. It is also proven and admitted by plaintiff, that he had moved up the track some thirty feet in the direction from where the train was expected, to a point beyond the usual stopping place of the engine, that the train was momentarily expected, and that it could be seen for a distance of 200 feet, and that it had on a head-light. That the speed of the train did not exceed eight miles an hour,

and stopped within fifteen feet of the place where he was struck. This is in substance plaintiff's testimony. The excuse is that, at the particular time, he was watching the approach of a train on another track and 'unconsciously' stepped back on the track of the defendant, when he was injured. Under all the decisions of this State, he was guilty of contributory negligence. In the case of *Hall v. L. & N. R. R. Co.*, 87 Ala. 719, the rule is thus declared: 'If he has been sufficiently warned or notified, and from inattention, indifference, absentmindedness, or forgetfulness, he fails to inform himself, or fails to take the necessary steps to avoid the injury, this is negligence, and he should not recover.' Hall was an employee of the defendant, but the rule as to 'absentmindedness' or 'forgetfulness' is equally applicable to all persons. No one is permitted to go upon or stand upon a railroad track without first looking or listening for an approaching train, and if he does so, and is injured in consequence, he is guilty of contributory negligence. *Webb v. L. & N. R. R. Co.*, 90 Ala. 185; *Ib.*, 97 Ala. 308." Judgment for defendant affirmed.

The Chewning case will be found frequently cited in the notes to Alabama cases in this volume, *post*.

HEWITT, WALKER & PORTER, for appellant.

ARNOLD & EVANS, for appellee.

Clopton, J. — The defect in the first count of the complaint, assigned as cause of demurrer, consists in the omission to state facts showing a duty owing by defendant to plaintiff, and its negligent performance. After stating that the defendant was engaged in the business of a common carrier of passengers, propelling cars by steam, the count avers, generally, that the company "did, through its agents and servants, so carelessly, negligently, and improperly propel and drive an engine and train so being used by said defendant, that by and through the carelessness, negligence, and improper conduct of the said defendant by its agents and servants, the engine and train so being propelled and driven as aforesaid ran against plaintiff with great force and violence," knocking him down and injuring him as before stated. For aught that appears from the count, plaintiff may have been a passenger, or an employee, or a mere trespasser. Admitting of more than one construction, that least favorable to plaintiff will be adopted.

While it has been said that the Code forms of pleading consist of general allegations of legal conclusions, rather than a statement of the particular facts which will support them, and though the statute requires that "all pleadings must be as brief as is consistent with perspicuity and the presentation of the facts or matter to be put in issue in an intelligent form;" yet the facts must be "so presented that a material issue in law or fact can be taken by the adverse party thereon." Code, § 2664. Ordinarily the rules of good pleading require that the facts, from which the conclusion of negligence is deducible, should be averred; not mere conclusion of law. *City Council of Montgomery v. Gilmer*, 33 Ala. 116; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284. This rule has been relaxed, from necessity, in cases where the cause of action consists in the nonperformance or misperformance of duty. In such cases, the rule has been thus stated: "When the *gravamen* of the action is the alleged nonfeasance or misfeasance of another, as a general rule, it is sufficient if the complaint avers facts out of which the duty to act springs, and that the defendant negligently failed to do and perform, etc.; not necessarily to define the *quo modo*, or to specify the particular acts of diligence he should have employed in the performance of such duty." The reason given is, "what the defendant did,

and how he did it, and what he failed to do, are generally better known to the defendant than to the plaintiff; and hence it is that, in such cases, a general form of averment is sufficient." *Leach v. Bush*, 57 Ala. 145. Under the rule, as thus stated, a general averment of negligence has been held sufficient, when the complaint averred that the plaintiff sustained the relation of passenger to the railroad company, or was an infant of tender years, not capable of contributory negligence, or that the injury was to stock. *Louis. & Nash. R. R. Co. v. Jones*, 83 Ala. 376, 9 Am. Neg. Cas. 5; *Mobile & Montgomery R. Co. v. Crenshaw*, 65 Ala. 566; *S. & N. Ala. R. R. Co. v. Thompson*, 62 Ala. 494. The statement of either of the foregoing facts has been regarded as a sufficient averment of facts showing the duty to act; but, in no case, except in *Ala. & Florida R. R. Co. v. Waller*, 48 Ala. 459, has a general averment of simple negligence been held sufficient, when not accompanied by an averment of facts from which the duty originates. In that case, the death of plaintiff's intestate resulted from a collision. The complaint, as in this case, did not state that the decedent was a passenger or employee, or had any connection with the railroad company. The ruling that the complaint contained a proper statement of facts was based on the erroneous principle, that the collision itself, and the consequent death of the plaintiff's intestate, were facts sufficient to create a presumption of negligence, for which the defendant was responsible. Under our decisions, a trespasser cannot maintain an action against a railroad company for injuries sustained while trespassing on its road-bed, unless such injuries were caused by reckless, wanton or intentional negligence. If a complaint affirmatively shows that the plaintiff is a trespasser, an actionable injury is not shown unless alleged to have been caused recklessly, wantonly, or intentionally. The presumption of negligence of such character and degree does not arise from the mere fact of injury to a trespasser. The count, failing to aver any relation or connection between plaintiff and defendant which creates the duty to use the highest degree of care, should therefore be construed as if he were an intruder. It may be that, had the count averred the engine and train were run against plaintiff by reckless, wanton or intentional negligence, it would have been held sufficiently certain — comports with our system of pleading — though no special acts or omissions constituting the negligence were averred.

But when, in such case, the complaint avers simple negligence, it is insufficient, the same as if it had affirmatively shown that plaintiff was a trespasser.

Neither can the doctrine of error without injury be applied, when the defendant is compelled to take issue on an insufficient count; especially in view of the fact that the court refused to instruct the jury that plaintiff could not recover under the defective count.

The correctness of the charges given, and the refusals to charge as requested by defendant, must be determined with reference to the evidence. The following facts may be stated as having a bearing on all of them: Defendant operated a main line from Birmingham to Ensley, and a branch line to Coalburg. Plaintiff, who was a passenger from Birmingham to Coalburg, left the train at the place where the main and branch lines met, called "the junction," for the purpose of taking the train to Coalburg, where he waited a half hour for its arrival. It was dark at the time of his injury. The place was in the woods, no houses near, and no depot, platform, or light. At the time he was struck, plaintiff was standing on the cross-ties of the track of the Coalburg line, with his back in the direction from which the train was coming, looking at the train which had gone to Ensley and returned. As to this, however, the evidence conflicts, some of the defendant's witnesses testifying that he was running to meet the Coalburg train.

The court admitted, against the objection of defendant, testimony that there was no station or platform erected, or light furnished at the junction; and instructed the jury that it was the duty of defendant to provide sufficient light at night at its regular stations or stopping places, at and about the time of the arrival and departure of trains; and if the place where plaintiff was struck was a regular station or stopping place, and defendant provided no light, this would constitute negligence, and if it proximately caused or contributed to plaintiff's injury, and he was not guilty of contributory negligence, the defendant is liable and the jury should so find. Defendant contends that it owed no duty, by the common law, or by statute, unless ordered by the Railroad Commission, to erect a station or platform, or to furnish light at the location, and under the surroundings. We are not prepared to say that it is the duty of a railroad company to provide sitting or waiting-rooms and platforms at all their

stopping places; but, from the general duty to provide safe and convenient modes of ingress and egress to and from its cars, arises the specific duty to have the place at which the company is accustomed to receive and discharge passengers properly constructed for such purpose, and to provide platforms, or other safe and suitable substitute, when necessary to the due performance of the general duty; also, to furnish lights when trains arrive or depart in the night-time. *Ala. Gt. So. R. R. Co. v. Arnold*, 80 Ala. 600; S. C., 84 Ala. 158. The statute making it the duty of every railroad company to have sitting or waiting-rooms, and to light the same, the platform and yards, when required by the order of the Railroad Commission, does not supersede or abrogate the common-law duty to erect platforms and furnish lights when necessary. Acts, 1886-7, 74. The statute has special reference toward providing sitting or waiting-rooms with proper accommodations, and to the time during which such rooms, platforms and yards shall be lighted; also, to provide a law under which the company may be compelled to furnish such accommodations, as to lights, the regulation of a recognized existing duty, and its performance. Under the evidence, it may be difficult to see how the want of a platform contributed, in the slightest degree, to the injury of plaintiff; but, there being no waiting-room, or other like accommodation, it was natural to expect that persons assembled, waiting for the train would not remain still, and as a light would afford opportunity to discover places of danger, we are not prepared to say that the evidence was wholly irrelevant.

Section 1144 of the Code declares: "The engineer, or other person having control of the running of a locomotive on any railroad, must blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road crossing, or any regular station or stopping place on such railroad, and continue to blow the whistle or ring the bell at short intervals, until he has passed such crossing, or reached such station or stopping place." Unquestionably, the junction, or point where the two lines of road met, was a stopping place in the meaning of the statute. The main objection urged to the charge given by the court, asserting the duty of the engineer required by the statute, is, that the statutory requirements are not applicable to a dummy line, the Coalburg train being propelled by a dummy engine. We have lately decided in the case of the *Bir. Min. R. R. Co. v.*

Jacobs, 92 Ala. 187, that defendant is a railroad corporation within the meaning of the statute, at least so far as it operates its road outside of the city limits. It is well settled that the failure to give the cautionary signals, or keep a proper lookout at such times and places, is negligence *per se*, entitling a person injured, who uses due care to avoid injury, to a claim for damages. Ga. Pac. R. R. Co. *v.* Blanton, 84 Ala. 154; So. & No. R. R. Co. *v.* Sullivan, 59 Ala. 272.

It is not inappropriate to observe in this connection that it was competent for the witness Waymoth, who had testified that he did not hear any whistle or bell, also to testify "there was nothing to prevent his hearing it." This is the mere assertion of a fact; that is, there was nothing in the surroundings to prevent his hearing it; and is unlike the case of a witness testifying that he would have heard the whistle or bell if blown or rung — a mere conclusion, of which the jury is as competent to judge as the witness, the distance and absence of intervening obstacles being stated.

The duty to check the speed of trains is statutory, and only applies when the train is "entering any curve crossed by a public road where he (the engineer) cannot see at least one-fourth of a mile ahead;" and is intended to prevent accident in the event of an obstruction at the crossing, unless it be in a city or town and regulated by municipal ordinance. Code, § 1144; Nash., Chatt. & St. L. R. R. *v.* Hembree, 85 Ala. 481. It is true that a rate of speed which would be the observance of due care and caution at places other than public crossings, or in a city or town, may become negligent when the train is approaching a station or stopping place, where many persons are accustomed to congregate on the arrival of the train; especially in the dark. East Tenn., V. & G. R. R. Co. *v.* Deaver, 79 Ala. 216. Under the evidence, it cannot, however, be assumed, that running a train at the rate of seven or eight miles an hour, which could be stopped within fifteen or twenty feet, is reckless (1).

Plaintiff testified that he and some friends were sitting on the switch-ties near the switch toward Birmingham, when he heard a whistle, and some one saying, "Here comes the dummy;" he and his friends arose, and walked up the Coalburg track about thirty feet beyond the switch, and as he walked, he looked

1. The majority of the cases cited ported or cited in notes among the in this opinion will be found either re- Alabama cases in this volume, *post*.

up the track to see if the Coalburg train was coming, but did not see it. He stopped between the tracks, and stepped on the ends of the cross-ties of the Coalburg track, looking at the Ensley train coming in; and after standing there a minute, or a minute and a half, was struck by the engine coming on the Coalburg track. There was a head-light on the engine, which could be seen from two hundred and fifty to three hundred feet from where he was struck. The train was past due, and he was momentarily expecting it; but did not look while standing on the cross-ties. These facts being undisputed, it is manifest that plaintiff was guilty of contributory negligence, and the charges above considered, being based upon the hypothesis that plaintiff was not guilty of contributory negligence, may be regarded as abstract. But giving such charges when they assert correct legal propositions, will not reverse the judgment.

While a person intending to take the train, awaiting its arrival, should not be regarded as a trespasser, if he merely cross, or inadvertently step on the track in the dark, at or about the usual stopping place; yet plaintiff, having walked up the track beyond the limits of the usual stopping place, to meet the train, and having knowingly and voluntarily stopped and stood on the cross-ties, where he was not invited, and had no right to be, must be regarded as a quasi-trespasser, or, as we have said, was guilty of negligence contributory to his own injury. Such being the case the real and material inquiry is, whether plaintiff was injured by the reckless, wanton or intentional negligence of defendant; for such negligence is requisite to overcome the defense of contributory negligence. The failure to have a platform, or furnish light, when needed, or to give the cautionary signals, or keep a proper lookout, is simple negligence, and insufficient to overcome the defense. Defendant owed plaintiff no duty to look out for and discover him at the particular *place* where he was struck by the engine. The duty which defendant owed appellant was to use all the means in its power, after his perilous position was discovered, to avert injury, and a failure to do so, is equivalent to reckless or wanton negligence. From the charges given at request of defendant, copied in the record, it appears that the trial court endeavored to restrict the investigation to this inquiry; and had it been so restricted, the case would have been greatly simplified. On this subject, the court, by request

of plaintiff, instructed the jury, that, if the plaintiff was himself negligent, or at an improper place when he was struck; yet, if the engineer saw his peril in time to stop the train, and could have stopped it before the plaintiff was struck, and failed to do so, and plaintiff did not know of his danger, then the defendant is liable, and the jury should so find.

We have repeatedly held, that when persons in charge of a train discover the perilous condition of one on the track, though a trespasser, it becomes their duty to use reasonable care to prevent injury, and the failure to do so is reckless or wanton negligence. *M. & C. R. R. Co. v. Womack*, 84 Ala. 149; *Frazer v. S. & N. Ala. R. R. Co.*, 81 Ala. 185. This is the proposition of the charge. But defendant insists, there is no evidence tending to show reckless, wanton or wilful negligence. The insistence is rested on the ground, that if the engineer be believed, his evidence showed that he did everything in his power, after discovering plaintiff, to save him, and that his evidence is uncontradicted; and on the other hand, if his testimony be disregarded, then there is no evidence tending to show that plaintiff was ever discovered, or that the engineer did not make every effort in his power to prevent the accident; in either event, that the charge was abstract. Positive, direct evidence as to the time when plaintiff was first seen, and as to the skill and diligence used thereafter to avoid injury, is not indispensable; these facts may be proved by circumstances, and are inferences to be drawn by the jury, applying observation and experience, to whom the question was submitted. The charges requested by defendant on the subject of contributory negligence withdrew from the jury the question of reckless or wanton negligence, and the charges relating to negative and positive testimony, not predicated on equal means of knowledge and credibility, were properly refused. *Sav. & Mem. R. R. Co. v. Shearer*, 58 Ala. 672. If the jury find that the plaintiff was injured by reckless, wanton or intentional negligence, this makes a proper case for awarding exemplary damages. *Ala. Gt. So. R. R. Co. v. Arnold*, 84 Ala. 159. Whether the other charges requested by defendant, should have been given or refused, may be easily determined by the application of the foregoing principles.

Reversed and remanded.

COLLISION BETWEEN CONSTRUCTION TRAIN AND ANOTHER TRAIN — WHEN RAILROAD COMPANY NOT LIABLE FOR INJURY TO PERSON RIDING ON PASS ON CONSTRUCTION TRAIN. — In **SCARBOROUGH v. ALABAMA MIDLAND RAILWAY CO.**, 94 Ala. 497, an action by Simon Scarborough against the Alabama Midland Railway Company, to recover damages for personal injuries sustained while traveling, as alleged in the complaint, as a passenger on a construction train, caused by a collision with another train, where it appeared that plaintiff was traveling on a pass furnished by the contractors who were constructing the railroad, plaintiff having been a laborer in the employ of the contractors, and the road was in course of construction and in exclusive control of the contractors, it was held that the railroad company was not liable to plaintiff and judgment for defendant was affirmed. The court (per WALKER, J.), after stating the facts of the case, said: "The train on which the plaintiff was riding was subject to the orders of the contractors while it was used as a construction train. They controlled its operation. It was doing service for them alone. It was operated as an agency to execute their will and to do their work. It was engaged in an employment over which J. M. Brown & Co., as independent contractors, had the general control, with the right to direct what should be done, and the manner of doing it. As a general rule, the owner of property may surrender to another the control thereof, and of the employee who is entrusted with the management of it. There are special cases in which the law does not permit such a surrender of control, or holds the owner responsible for the management of the property though it is actually controlled by another; as, where the law charges the owner with the duty of performing the service in which the property is used, or where the work in which the property is to be used, under a contract with the owner, is necessarily or intrinsically dangerous. *Mayor and Aldermen v. McCary*, 84 Ala. 469. Unless the owner is held to responsibility upon some such consideration the rule which is sustained by the weight of the authorities is, that though the property of one person which is used in a special service for another is at the time managed or operated by an employee of the owner or proprietor, yet, if such employee, in regard to the particular matter in which he is engaged, is under the control, not of his general master, but of the person for whom the special service is rendered, who, in reference to the details of that work, has the management thereof as an independent contractor, then such property is to be regarded as used in the service of the independent contractor, and, as to that particular service, the employee is to be

regarded as the servant, not of his own general master, but of the independent contractor whose work he is doing. In such case, the contractor has the actual management, in details, of the property while it is used in his business, and the person in direct charge of the property is identified with him as his servant as to that special service. In applying the rule just stated, several courts have held that a railroad company is not liable for damages resulting from the negligent management of one of its trains used and controlled by construction contractors for construction purposes on a portion of its road built under construction contract and not yet turned over to the railroad company, though the train employees are hired and paid by the railroad company. *Powell v. Construction Co.*, 88 Tenn. 692; *Cunningham v. Railroad Co.*, 51 Tex. 503; *Miller v. Minnesota & N. W. R. Co.*, 76 Iowa, 655; *Hitte v. R. V. R. Co.*, 19 Neb. 620, 14 Am. & Eng. Encyc. of Law, 838. The present case does not call for the application of the rule stated in the authorities just cited, for the person who, on the evidence, was guilty of negligence of which the plaintiff complains, was not in any sense the servant of the defendant; and, in the circumstances disclosed, it is plain that the defendant cannot be charged with responsibility merely because the train on which the plaintiff was riding was the property of the defendant. The defendant did not have any such control of the trains as to render it chargeable with their negligent management. There was no error in the charge given by the Circuit Court at the request of the defendant." *Judgment affirmed.*

GOTHARD v. ALABAMA GREAT SOUTHERN RAILROAD COMPANY.

Supreme Court, Alabama, December Term, 1880.

[Reported in 67 Ala. 114.]

ACCIDENT AT RAILROAD CROSSING — CONTRIBUTORY NEGLIGENCE — RULE AS TO DEFENSE. — In every action for damages, where contributory negligence is relied on as a defense, the question to be determined is whether plaintiff's negligence contributed proximately to the injury; it is not essential that the plaintiff should have been the cause of the injury, in order to defeat a recovery.

CONTRIBUTORY NEGLIGENCE — WHEN NOT AVAILABLE AS DEFENSE. — Although a plaintiff negligently exposes himself to peril, yet, if he uses proper diligence in escaping the danger when the danger becomes apparent, and the servants of the defendant fail to use all the proper means in their power to avert the danger, the defendant is liable, and the original negligence is no defense to the action.

FAILURE TO LOOK AND LISTEN — DUTY OF RAILROAD. — Where the plaintiff placed himself in peril by driving his wagon and team on a crossing without looking or listening for approaching trains, at a place where his view was so obstructed that he could not see a locomotive which was approaching, and near at hand, and by which he was struck and injured, he is guilty of such negligence as precludes a recovery of damages for the injury unless the defendant could have averted the injury by the use of all means which were reasonably capable of adoption for the purpose.

RUNNING TRAINS AT PROHIBITED SPEED — DUE CAUTION. — Where a city by ordinance fixes the speed at which railway trains may be run, it is negligence to run such a train within the limits of the city at a rate of speed greater than that fixed by the ordinance; but when the speed allowed by the ordinance is six miles per hour, and the train was running at a speed less than prohibited, and the bell was being rung when the accident occurred, this is, *prima facie*, the exercise of due caution.

The case of *Nashville & Decatur R. Co. v. Comans*, 45 Ala. 437, so far as it conflicts with this case, is overruled (1).

APPEAL from judgment for defendant rendered in the Jefferson Circuit Court. *Judgment affirmed.*

"Action to recover damages for personal injuries sustained by collision at railway crossing in the city of Birmingham. The municipal ordinances of that city prohibit the running of trains at a rate of speed greater than six miles per hour. As plaintiff reached a place where four railroad tracks which ran parallel to each other crossed the highway, there was a train backing along one of these tracks, which belonged to the South and North Ala. R. R. Co. He stopped to let this train pass, but did not get down from his wagon to look out for approaching trains.

1. In *Nashville & Decatur R. R. Co. v. Comans*, 45 Ala. 437, an action for negligent killing of plaintiff's mule by defendant's locomotive, judgment for plaintiff was reversed for erroneous admission of evidence and charge as to statutory liability. The syllabus states the points as follows: "The liabilities of railroad companies, in Alabama, for the killing or injury of stock by their cars or locomotives, are governed by the statute upon 'Railroads,' found in the Revised Code (secs. 1399-1416, both inclusive). This statute is to be taken and construed as one law. Under this law, a railroad company, in order to exonerate itself from such lia-

bilities as are imposed by the statute, must show that the injury complained of did not result from a failure on the part of its servants to comply with the requirements of section 1399 of the Revised Code, or from any negligence on the part of the company or its agents. Sec. 1401. If the company, or its agents, are not guilty of any negligence and comply with the requirements of sec. 1399 of the Revised Code, then the company will not be liable for stock killed or injured by its trains or locomotives while engaged in its legitimate business." Opinion rendered by PETERS, J.

As soon as this train was out of the way a man on foot crossed the tracks, and the plaintiff started across without observing a train which was approaching at a speed, variously estimated by persons, at from five to ten miles per hour, on a track belonging to the Alabama Great Southern R. Co. This latter train was hidden from him by the backing train, until it was within about twenty feet from him. As soon as the men in charge of the train, which was concealed from him, saw him, they rang the bell, blew the whistle, put on the brakes, and used all the appliances known to skilful engineers to avert the injury, but the locomotive struck plaintiff's wagon, turned it over, broke his thigh and permanently disabled him. At the time the accident occurred the bells on both engines, and they were dissimilar in their tones, were being rung. Gothard brought this action against the Alabama Great Southern R. Co., to recover damages for the injuries thus inflicted on him.

“On the trial of the case the court charged the jury, in writing, at the request of the defendant, that if they believed from the evidence, that the agents of the defendants, who were operating the train that ran against and injured the plaintiff, were on the lookout and saw the wagon which plaintiff was driving, as soon as it was uncovered by the train on the South and North Ala. R. R., and after discovering the peril plaintiff was in, applied the brakes and reversed the engine, and used all means in their power, known to skilful engineers, to stop the train; and if the jury further believe, that defendants' train, at the time of the accident, was not running more than six miles an hour; and if they further believe that the bell of the engine was being rung, as testified by the witnesses, then the plaintiff cannot recover. To this charge the plaintiff excepted. 2. The plaintiff was bound to use his eyes and ears, as far as there was opportunity, to discover and avoid danger, and if by such use of his senses, he might have discovered and avoided the danger, but omitted to do so, and if such omission on his part contributed proximately to produce the injury complained of in this cause; and if, without such omission on his part, the injury would not have occurred, then, upon this state of facts, the plaintiff is not entitled to recover. The plaintiff also excepted to the giving of this charge. 3. The defendant was authorized by law, at the time the injury occurred, to run its train within the corporate limits of the city of Birmingham, and across Twentieth

street in said city, at a speed not exceeding six miles an hour; and if, at the time of the accident, said train was being run at not exceeding six miles an hour, its being run at such speed was not negligence on defendant's part. To this charge plaintiff excepted.

4. Because of the character and momentum of defendant's train, the law will not require it to stop its train and give precedence to plaintiff's wagon to make the crossing first; it was the duty of plaintiff to wait for defendant's train to pass before he attempted to cross; and if he could, by the exercise of due diligence, have discovered the approach of defendant's train; and if plaintiff attempted to cross in front of defendant's train, knowing of its approach, or if, by the exercise of due diligence, he could have discovered its approach, he would be the author of his own misfortune, and could not recover in this action, unless the jury should believe from the evidence that upon the manifestation of plaintiff's peril, those who controlled plaintiff's train failed to use due diligence to prevent the injury, or unless the jury should believe that those who controlled defendant's train injured the plaintiff wantonly, recklessly, or intentionally. To this charge the plaintiff also excepted.

5. Although the jury may believe from the evidence that the agents and employees of the defendant neglected to use due care and diligence to avoid the collision, this did not relieve the plaintiff from the necessity of taking due care and precaution for his safety. Before attempting to cross the railroad track he was bound to use his senses to look and to listen in order to avoid the accident in this case, from defendant's approaching train. If he omitted to use his senses of sight and hearing, and drove thoughtlessly on the track; or if, using them, he saw or heard the train coming, and instead of waiting for it to pass he undertook to cross the track, he so far contributed to the injury complained of by him as to deprive him of any right to recover, unless you believe from the evidence that, upon the manifestation of plaintiff's peril, those controlling plaintiff's train failed to use due diligence to prevent the injury, or unless the jury should believe that those controlling defendant's train injured the plaintiff wantonly, recklessly or intentionally.' To the giving of this charge the plaintiff excepted. The court further charged the jury 'that the law required of the defendant and its agents and employees, who were controlling the defendant's train that ran against and injured the plaintiff, that degree of diligence which

very careful and prudent men take of their own affairs, and that the defendants and its agents and employees shall employ their care and prudence actively, as very careful and prudent men watch over their own important interests and enterprises of similar magnitude and delicacy; that the law required of the plaintiff in attempting to drive his wagon across the defendant's track, at its intersection with Twentieth street in the city of Birmingham, ordinary care and diligence — only that care and diligence which an ordinarily careful and prudent man would exercise under similar circumstances.' To this charge the plaintiff also excepted. Verdict for defendant. The above charges of the court are assigned as error."

M. T. PORTER, and TERRY & LANE, for appellant.

HEWITT & WALKER, and RICE & WILEY, for appellee.

Somerville, J. — In every action for damages, where the defense of contributory negligence arises, the question always to be determined is, whether the negligence of the plaintiff contributed proximately to the injury of which he complains. It is not essential that he should have been the *cause* of the injury. It is sufficient to defeat a recovery, if the plaintiff could have avoided the injury by the exercise of reasonable or ordinary care and prudence, unless, perhaps, in those cases where the misconduct of the defendant, which produces the injury, is wanton, reckless or intentional. Shear. & Redf. on Neg., § 34; Wharton's Law Neg., § 300.

The doctrine is properly stated by Stone, J., in *Tanner's Ex'r v. Louis. & Nash. R. R. Co.*, 60 Ala. 621. The rule, as there settled, is, that although a plaintiff may be at fault in exposing himself to peril, yet if he uses proper diligence in escaping when the danger becomes apparent, and the servants of the company fail to use all the proper means in their power by the exercise of which the danger might be avoided, the railroad company is liable for the injury proximately produced, and the original negligence is no defense to the action.

The principle is stated as follows, in *Field on the Law of Damages*, § 170: "The plaintiff cannot recover, notwithstanding the negligence on the part of the defendant, if he has so far contributed to the accident, by the want of ordinary care, that, but for that, the accident would not have happened; but, though the plaintiff has so contributed to the accident, he is not entitled to recover if the defendant, by ordinary care, could have

avoided the consequences of the plaintiff's neglect, and when, but for the plaintiff's negligence at the time, he might have escaped the consequences of the defendant's negligence, he cannot recover." This rule is correct as a general one, but more than ordinary care is required of those having the control of steam engines and the management of railroad trains. The law exacts, in such cases, a care and diligence proportionable to the hazard of the enterprise, which has been declared by this court to be "that degree of diligence which very careful and prudent men take of their own affairs." *Railroad Co. v. Waller*, 48 Ala. 459; *Tanner v. L. & N. R. Co.*, 60 Ala. 621.

In the case at bar, as the evidence tends to show, the plaintiff placed himself in a position of great peril. He drove his wagon and team of oxen upon the crossing, when his view was so obstructed that he could not see the approaching locomotive, then very near at hand. It has been repeatedly held, that to walk or drive upon the track of a railroad without looking in both directions so as to discover approaching engines and trains, is such negligence as would preclude a recovery unless the defendant could have averted the resulting injury by the exercise of all the proper means, reasonably capable of adoption at the time. *Railroad Co. v. Hunter*, 33 Ind. 335; *Railroad Co. v. Weber*, 76 Pa. St. 157. Many of the adjudged cases have gone so far as to hold that where the approach to a railroad was dangerous, because the track could not be seen beyond the point of crossing, one failing to pause and listen, before attempting to cross the track, is guilty of such negligence, *per se*, as to preclude any recovery, and that the question of contributory negligence should not even be permitted to go to the jury. *Field on Damages*, § 175, and cases cited.

In *Railroad Co. v. Godfrey*, 71 Ill. 500, it was said: "As a general rule, it is culpable negligence to cross the track of a railroad at a highway crossing, without looking in every direction that the rails run, to ascertain whether a train is approaching." *Shear. & Redf. on Neg.*, § 483, and note. The same court said, in *Railroad Co. v. Gretzner*, 46 Ill. 74: "If a party rushes into danger which, by ordinary care, he could have seen and avoided, no rule of law or justice can be invoked to compensate him for any injury he may receive. He must take care, and so must the other party." *Railroad Co. v. Hail*, 87 Ill. 529

The case of the *Penn. R. R. Co. v. Peale*, 73 Pa. St. 304, was

similar to the one under consideration. The line of the railroad was obstructed from the view of a traveler on a highway, who was approaching a crossing in a wagon. He failed to stop and look before he attempted to cross the track. It was held that this was such contributory negligence as to defeat a recovery for the death of the traveler, which was produced by collision with a passing train at the crossing. It was his duty not only to stop, but to look and listen, using both his eyes and ears to discern approaching trains, and a failure to do so, the court said, was negligence *per se*. Railroad Co. *v.* Hetherington, 83 Ill. 510; Railroad Co. *v.* Weber, *supra*. The principle settled in this, and other like cases, may be taken as sound, with the qualification, that the defendant would, nevertheless, be liable if, by the exercise of reasonable care and proper prudence, the accident could have been avoided or the injury averted. Button *v.* R. R. Co., 18 N. Y. 240; Railroad Co. *v.* McElmurry, 24 Ga. 75; Tanner *v.* R. R. Co., 60 Ala. 621; South and North Ala. R. R. Co. *v.* Thompson, 62 Ala. 494.

The running of a railroad train within the limits of a city, at a rate of speed prohibited by its ordinances under a penalty, would constitute negligence. Correll *v.* R. R. Co., 38 Iowa, 120. The evidence in this case showed that the speed permitted by an ordinance of the city of Birmingham, where the injury occurred, was six miles per hour. If the defendant did not exceed this rate of speed, and the engineer was ringing the bell at the time the locomotive was approaching the crossing, when the accident in question transpired, this would *prima facie* be an exercise of due caution in this particular regard. Code (1876), § 1699. There was no evidence rebutting this presumption, or tending to show that the rate of speed permitted by the city ordinance was unreasonably fast, and not duly proportioned to the danger to be apprehended of inflicting injury upon others. The case of the Nashville & Decatur R. R. Co. *v.* Comans, 45 Ala. 437, is hereby overruled so far as it is in conflict with this opinion, it being entirely opposed to the vast preponderance of authority (1).

The rulings of the Circuit Court were a clear recognition of the principles expressed in this opinion, and were, therefore, correct. *Judgment affirmed.*

1. See note of this case, page 33, *ante*.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY v. ANDERSON.

Supreme Court, Alabama, November Term, 1895.

[Reported in 109 Ala. 299.]

CROSSING OF PUBLIC STREET — MAKING " KICKING " OR " FLYING " SWITCH IN VIOLATION OF MUNICIPAL ORDINANCE — NEGLIGENCE OF RAILROAD COMPANY — Where the servants of a railroad company in violation of a municipal ordinance prohibiting the making of " flying " or " running " switches on or across any street, make a " kicking " or " flying " switch in the night-time over one of the most frequented streets of the city and injury results, the railroad is liable (1).

STOPPING TO LOOK AND LISTEN — NEGLIGENCE OF FLAGMAN — CONTRIBUTORY NEGLIGENCE. — Where the flagman stationed at a railroad crossing in a city, displayed a signal which, under a municipal ordinance, was an assurance that the way was clear, and a traveler went upon the track without stopping his team in order to look and listen, he is not chargeable with contributory negligence.

FLAGMAN AT CROSSING — SIGNAL NOT HEEDED — DUTY TO FLAG TRAIN. — Where a flagman stationed by a railroad company at a street crossing discovers that his signal to an approaching traveler is unobserved or unheeded, it is his duty to flag an approaching train, when this can be done before the danger becomes imminent.

APPEAL from the City Court of Birmingham. *Judgment affirmed.*

"Action by Frank Anderson against the Alabama Great Southern Railroad Company, to recover damages for personal injuries, and for the destruction of his carriage, and injuries to his horses, sustained in a collision resulting from the alleged negligence of the defendant. The defendant pleaded the general issue, and contributory negligence on the part of the plaintiff. The facts, in substance, are as follows: On the 15th day of July, 1893, the plaintiff, with a driver, was in a carriage attempting to cross the railroad track on Twentieth street in Birmingham. It was at night, but several electric lights were burning at the crossing. Twentieth street, at this place, is crossed by

1. " *Kicking switch.*" — It cannot be said as matter of law that a " kicking switch," or " flying switch," or " running switch," — by whichever term it is designated, — is negligence *per se*, as they seem to be in general use by well-regulated railroads. *Williams v. S. & N. Ala. R. Co.*, 91 Ala. 635, 640, *citing Davis v. L. & N. R. Co.*, 91 Ala. 487; *Perry v. L. & N. R. Co. (Ala.)*, 8 So. Rep. 55

many railroad tracks and is a principal crossing in the city; the railroads use it constantly crossing the street, day and night. The persons in the carriage were thoroughly familiar with this crossing, and knew that it was constantly used by the railroads, as well as by pedestrians and those crossing in vehicles. The plaintiff did not stop before he started across this railroad, but he did look up and down the railroad tracks to see if any train was coming and did not see any. A flagman, who was on the track, waved a white light, as a signal for him to cross, and he started across, but, before he had gotten across, his carriage was struck by two cars which had been cut loose from the engine; and he himself was hurt, his carriage crushed to pieces, and his harness and his horses damaged. He and his driver were engaged in conversation, and they were crossing the railroad tracks at a trot. The plaintiff's injuries were painful, and he was in bed for some time, and unable to work for nine weeks; his services were worth about a dollar and a half a day during the time he was unable to work. His carriage was worth from \$350 to \$400. The cars, at the time they hit plaintiff's carriage, were running at the rate of seven or eight miles an hour."

"There was evidence for the defendant tending to show that the plaintiff was driving recklessly; that the flagman hallooed to the plaintiff, besides waving his red light, but that the plaintiff paid no attention to the warning; that at the time of the accident, and while the train was crossing the street, the bell of the engine was ringing, and that the headlight on the engine was burning; that the engineer received the signal from the foreman to stop, and that as soon as the signal was given he reversed the engine, and sanded the track, and that the train was stopped as soon as it could have been after he received the signal. The court, trying the case without a jury, rendered judgment for the plaintiff, assessing his damages at \$700. The defendant appeals from this judgment, and assigns the rendition thereof as error."

A. G. SMITH, for appellant.

BOWMAN & HARSH, for appellee.

Brickell, Ch. J. — We have several times had occasion to consider the relative duties of railway companies and travelers at public crossings. Our former decisions on the subject will be found collated in *Louis. & Nash. R. Co. v. Webb*, 97 Ala. 308. In that case, as here, the injury occurred where a thoroughfare

in the city of Birmingham crossed the tracks of several railroads; and we attempted to differentiate cases of this character — crossings in populous cities — from less-frequented crossings in the country. This case differs from that in the fact that the person there injured was a pedestrian, while here he was driving a vehicle, but this fact in no wise affects the principles there announced. The duty to increase the degree of care in proportion to the danger to be apprehended at such places pertains alike to both cases.

A number of sections of the City Code of Birmingham, relating to the movement and speed of trains, the duties of flagmen, etc., were put in evidence. By section 465 it is provided: "It shall be the duty of such flagmen to remain at all times in full view of persons approaching such crossings, either on foot or in vehicles, and to signal them to pass over, if they can safely do so, or to stop, if a train is approaching too near to admit of a safe passage." Section 466 prohibits the moving of trains at a greater rate of speed than eight miles an hour when running forward, or four miles an hour when moving backward, and requires a headlight on the engine or train at night, and the giving of signals by whistle or bell at all times. By section 467 the making of flying or running switches on or across any street is prohibited, and made punishable by fine. We have held in many cases that a violation of ordinances of this character is culpable negligence. *Louis. & Nash. R. R. Co. v. Webb, supra*, and cases there cited. Whether, notwithstanding such violation, the plaintiff may be barred by contributory negligence, depends upon the attendant facts. In the *Webb Case, supra*, we held that running a train at a high rate of speed over a crossing such as this might "amount to that recklessness which is the equivalent of wantonness and wilfulness," but that the question was one for the jury. This is a stronger case, taking it in its most favorable aspect for the appellant. A "kicking" or "flying" switch was being made *in the night-time* over one of the most frequented streets of the city. But whether, on the facts alone, the servants of the company were not guilty of such recklessness as would be the equivalent, *as matter of law*, of wantonness or wilfulness, the necessities of this case do not require us to decide. That they were guilty of simple negligence cannot be denied.

Was there contributory negligence on the part of the plaintiff?

We have frequently emphasized the duty to stop, look, and listen on approaching a public crossing. *Louis. & Nash. R. R. Co. v. Webb*, 90 Ala. 185. In *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262, the necessity of "looking" was qualified in cases where, the view being obstructed, the driver, in performing the duty, would be compelled to leave his team unattended. Here, as there, the view was obstructed by a standing train. It is unnecessary, however, to discuss this aspect of the case, for it is affirmatively shown that the plaintiff went upon the crossing without stopping. This, if inexcusable, would of itself constitute contributory negligence, and, if excusable, would also dispense with the other duty. In *Webb's Case*, 90 Ala. 185, 197, *supra*, we left it an open question whether the fact that the gate to a crossing was left open (it being the duty of the servant to close it on the approach of a train) was not an implied invitation to cross (1). Treating that question as still open, the evidence of the plaintiff and the person who was with him, if believed, here disclose an *express* invitation. Both testify that the flagman displayed a white light, which, under the section we have quoted, was an assurance that the way was clear. There is other evidence, it is true, in conflict with this; but on the whole evidence, aided by the presumption that the plaintiff, if warned in time, would not have placed himself in a position of such imminent peril to his life or limb, we will not disturb the finding. Besides, it is shown by the evidence that the servants of the company, before the danger became imminent, were aware of the approach of the vehicle. If, as the flagman testifies, the plaintiff was distant 150 feet when he was warned, it was his duty to have flagged the approaching train, upon discovering that his warning was unobserved or unheeded. It is also shown that the brakeman was aware of the approach of the vehicle, when preparing to uncouple the moving cars. A signal at this juncture, to the engineer, would, under the evidence, have averted the injury.

On the whole evidence we concur in the judgment of the court below. *Affirmed.*

1. See the *Webb* and *Lee* cases, cited in the case at bar, reported among the *Alabama* cases in this volume, *post*; which cases are also cited in several of the notes appended to the *Alabama* cases reported herein.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY V. LINN ET AL.

Supreme Court, Alabama, November Term, 1893.

[Reported in 103 Ala. 134.]

PRIVATE CROSSING — LICENSE — INJURY TO TRAVELER — QUESTION OF WILFUL OR WANTON NEGLIGENCE IMPROPERLY SUBMITTED TO JURY. — In an action against a railroad company for damages to a team and wagon at a crossing, where the evidence showed that the crossing was not a public crossing, but when the public crossing was obstructed, was used as a matter of convenience, without interference or objection from the railroad company, and the evidence was in conflict as to whether or not signals of approach were given by the train causing the injury, and also as to whether plaintiff's servant, who was driving the wagon, stopped and looked and listened before attempting to cross the track, and there was no evidence from which it could be inferred that defendant's servants were negligent in the use of preventive effort after the discovery of the perilous situation of plaintiff's team: *Held*, error for the court to submit to the jury the question of wilful or wanton negligence on the part of defendant, there being no evidence in the case that would justify the jury finding such negligence (1).

1. *Crossing other than public — License — Duty of railway — Notice or knowledge must be shown to establish liability.* — In *STRINGER v. ALABAMA MINERAL RAILROAD CO.*, 99 Ala. 397, the plaintiff brought an action to recover damages for personal injuries sustained by being thrown from the track in the street by an engine at a point other than a public crossing, but much used by foot passengers, and vehicles were in the habit of crossing. The train was running at a speed of ten to twenty miles an hour, and no signal was given. From the testimony of the plaintiff it appeared that before starting to cross the track he looked to the west and saw no train approaching; he was able to see about forty yards in this direction. He also looked to the east and saw no train. Upon taking a few steps up the embankment to cross the track he was struck by an engine of the defendant coming from the west. The court say: "The place where the in-

jury occurred was within the corporate limits of the city of Talladega, but not at a public crossing, or other place of such character, or under such conditions, as that defendants were chargeable with notice, in the absence of proof of actual knowledge, that there were persons on the track at the time and place where the injury occurred, or a knowledge that injury would result as the probable consequences of any more neglect of duty. *L. & N. R. Co. v. Webb*, 97 Ala. 308; *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262; *Anniston Pipe Works v. Dickey*, 93 Ala. 420; *Chewning v. Ensley R. Co.*, 93 Ala. 29." * * * "At the place where the plaintiff was injured, he had no right to stand upon defendant's track, or walk along the track. His only right was the right of crossing. If he was standing on the track, or walking along it, he was a trespasser. If he was merely crossing the track, a right he undoubtedly had in the transaction

STATUTORY REQUIREMENTS — FAILURE OF RAILROAD COMPANY TO OBSERVE — SIMPLE NEGLIGENCE. — Where the employees of a railroad company fail to comply with the statutory requirements (Code, § 1144), by giving signals when passing through any village, town or city, or by failure to observe the rate of speed fixed by law, the railroad company is guilty of simple negligence.

LICENSEES NOT TRESPASSERS — DUTY OF RAILROAD COMPANY. — It is not trespass for a person to cross the track of a railroad company, wherever he may have occasion to do so, and where a railroad company has acquiesced in the use of a private crossing without objection, persons using such crossing are mere licensees; and the railroad company owes them no other duty than to look out for obstructions, and to exercise due care and reasonable diligence to avoid injuring them after discovering their peril.

EXPERT TESTIMONY—WHEN ADMISSIBLE. — In an action against a railroad company for injuries to a team at a crossing, where a witness who properly qualified as an expert by testifying that he had worked on an engine eleven years and knew all about the management of locomotives, who was on the engine at the time of the accident, and testified to all the acts done by the engineer in charge of the engine, in his efforts to stop the train as soon as the signal of danger was given him: *Held*, error not to permit such witness to state whether or not the train was stopped as soon as it could have been done after the signal was given.

EVIDENCE AS TO ABILITY OF DRIVER TO SEE TRAIN — WHEN ADMISSIBLE. — In an action for injuries resulting from collision with a team at a crossing, where a witness testifies that he was standing behind the team when it started across the track, that he heard the train coming, and looked up and saw it, that he called to the driver of said team, and told him not to attempt to cross, but the driver seemed excited, and, without stopping before trying to cross, and without appearing to look or listen for a train, he whipped up his team and started across: *Held*, competent to ask such witness whether the driver of this wagon could have seen the cars in time to have prevented the accident, if he had looked up and down the track before attempting to cross.

of business, and had exercised due caution, had looked and listened and thus assured himself he could with safety venture across, and while in the exercise of the right to cross, was injured by the negligence of the defendant, the plaintiff would be entitled to recover. This is the rule as declared in the case of *Glass v. M. & C. R. Co.*, 94 Ala. 587, and we think it a sound rule and adhere to it."

Instruction as to "wanton," "reckless" or "intentional" injury. — In the above case (preceding paragraph) there was no evidence to show that the defendant had knowledge that the plain-

tiff was on the track, and the trial court charged the jury that there was no evidence in the case to show that the injuries to the plaintiff were caused by the defendant, or its agents, wantonly, recklessly, or intentionally; and the Supreme Court held the defendant was entitled to this affirmative charge, *citing* *L. & N. R. Co. v. Johnson*, 79 Ala. 436; *B. & M. R. Co. v. Jacobs*, 92 Ala. 192; *H. A. & B. R. Co. v. Winn*, 93 Ala. 308; 2 Am. Neg. Cas. 78.

See also note on Degrees of Negligence, appended to *Birmingham R'y & Elect. Co. v. Bowers*, 110 Ala. 328, reported in this volume, *post*.

APPEAL from the Circuit Court of Jefferson. *Judgment reversed.*

“George W. Linn & Son, appellees, brought action against the Alabama Great Southern Railroad Company, to recover damages sustained by reason of injuries inflicted to a team of mules, wagon and harness owned by them, caused by reason of the negligence of the defendant, through its employees. The negligence complained of was the failure to give the proper signals while passing the crossing at which the accident occurred; failure to stop the train after discovering the peril of the plaintiff's team; and the running of said train at a high rate of speed across the road crossing where the accident happened. The defendant pleaded the general issue, and in several different forms the contributory negligence of the plaintiffs; and upon these pleas issue was joined. There were verdict and judgment for the plaintiff, and defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.”

A. G. SMITH, for appellant.

R. L. THORNTON and J. W. BUSH, for appellees.

Coleman, J.—The appellees, Linn & Son, brought the present action to recover damages sustained by them by the loss of one mule, injury to another mule, and the destruction of a wagon and harness. The proof shows that the injury was the result of a collision by a train of cars operated by the defendant. The proof also shows that the collision occurred at a private crossing; that is, according to the proof in this case, at a place used for crossing the railroad track, as a matter of convenience, and not as a matter of public right nor a matter of private right. The proof is that, as a crossing, at times it was closed for weeks and months without objection or protest; that, when it was unobstructed, any and everybody who saw proper to avail themselves of its accessibility and convenience used the crossing without interference or objection, and sometimes as many as twenty wagons a day, hauling slag and cinders from the Alice furnace, crossed there. The proof shows that scattered along on both sides of the railroad track there were forty or fifty dwelling houses, and the place was a village known as “Alice Furnace.” The train was being backed at the time of the collision, and the speed is placed by the witnesses at from six to twenty-five miles an hour. The evidence was in conflict as to whether or not signals of the

approach of the train were given, and also whether the plaintiff's servant, who was driving the wagon, stopped and looked or listened before driving upon the track.

In its instruction to the jury, and in refusing instructions requested, the trial court proceeded upon the theory that there was evidence of wilful and intentional injury, or negligence so wanton and reckless as to be its equivalent. This is the first question for consideration. We have examined the record, and have discovered no fact from which it could be inferred that defendant's servants were negligent in the use of preventive effort after the discovery of the perilous position of plaintiff's team, or had any actual knowledge of the presence and peril of plaintiff's team in time to have prevented a collision by the use of preventive effort. Neither does the evidence show such conditions or attending circumstances as would justify the imputation of such knowledge to those operating the train. The place was not a public crossing. It was not a street or a public thoroughfare. At times a good many wagons crossed there, engaged in hauling slag and cinders from the Alice furnace; at other times, for weeks, it was closed. At no time was it used as a matter of right, but only of convenience. The principles which apply under such circumstances are stated in the case of *Louis. & Nash. R. R. Co. v. Webb*, 97 Ala. 308, and authorities cited; *Stringer v. Ala. Min. R.R. Co.*, 99 Ala. 397, 11 Am. Neg. Cas. 43.

We think the court erred in submitting the question of wanton negligence and wilful injury to the jury. The statute (Code, § 1144) requires the engineer "to blow the whistle or ring the bell, at short intervals, on entering into, or while moving within, or passing through, any village, town, or city;" and by section 1147 of the Code it is declared that "a railroad company is liable for all damages done to persons, or to stock or other property, resulting from a failure to comply" with these requirements. We are of opinion that the Alice furnace is a "village," within the meaning of section 1144, *supra*. The failure to observe these requirements, *per se*, is no more than simple negligence. *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262; *H. A. & B. R. Co. v. Sampson*, 91 Ala. 560. We have held that under some circumstances, a person may cross over a railroad track, wherever he may be at, on its line, without being a "trespasser" in the sense in which that term is usually understood. *Stringer v. Ala. Min. R. R. Co.*, 99 Ala. 397, *supra*; *Glass v. Memphis & C. R. Co.*, 94 Ala. 587. This

rule would be especially applicable in cases like the present, where it has been acquiesced in without objection. The person undertaking to cross a railroad under such circumstances is entitled to no other privileges or protection than a mere licensee. He cannot thereby impose the additional duties upon a railroad to know he is there, or to keep an especial lookout for him. All that can be required of a railroad company, operating its trains over its own track, under such circumstances, is to perform its duty in looking out for obstructions, and to use due care and reasonable diligence to avoid inflicting an injury to persons after being conscious of the peril. When the railroad has done this, it has discharged its duty to the person undertaking to cross its track at such crossings. *Pratt Coal & Iron Co. v. Davis*, 79 Ala. 308; *Tanner v. L. & N. R. Co.*, 60 Ala. 621. These principles of law embrace all questions arising from instructions given, and those refused, to which exceptions were reserved (1).

The court erred in not permitting the witness Mason to answer the questions propounded to him. This witness had testified to all the acts done by the engineer in order to stop the train. He was an expert. Whether we regard the answer as a shorthand rendering of facts, or as the opinion of an expert upon facts stated, in either view, it was admissible.

The court should have allowed the question to the witness Wright. This witness had shown he was in a position to see both the railroad track and plaintiff's servant. If his testimony was credible, he knew how far off the train was, and plaintiff's servant's position. He could testify as a fact whether one looking could have seen the approaching train, and whether, by looking, the driver could have seen it, before venturing across the track. The opportunity and means of knowledge and the credibility of the witness, and the weight to be given to his testimony, could have been tested by a cross-examination. *Tesney v. State*, 77 Ala. 33; *McVay v. State*, 100 Ala. 110. Reversed and remanded.

1. The majority of the cases cited in this opinion are reported in full, or cited in notes, among the Alabama cases in this volume.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY v. SAMPSON.

Supreme Court, Alabama, November Term, 1890.

[Reported in 91 Ala. 560.]

CROSSING — FAILURE TO LOOK AND LISTEN — CONTRIBUTORY NEGLIGENCE. — A person who, on approaching a railroad crossing, drives across without stopping to look and listen, is guilty of such contributory negligence as bars a recovery for damages on account of injuries sustained from a collision with an approaching engine.

UNLAWFUL SPEED. — In such a case the fact that the train was running at a greater rate of speed than allowed by a municipal ordinance there in force, does not avoid or overcome the defense of contributory negligence, if the engineer used due diligence to prevent the collision after becoming aware of plaintiff's peril, provided, after plaintiff's peril was apparent, he could have avoided the injury by the use of due care and vigilance.

APPEAL from the City Court of Birmingham. *Judgment reversed.*

“Action brought by Goode Sampson against the appellant corporation, to recover damages for the loss of his mule, which was killed, and injuries to his wagon, caused by a collision with an engine and train of cars on the defendant's track, at the intersection of two streets in the city of Birmingham. The evidence was conflicting as to whether the head-light on the engine was burning at the time; and there was conflicting evidence as to the speed of the train and as to the gait of the mule. One Grant, who was driving plaintiff's wagon, testified that the mule “was in a quick walk;” that he did not see the engine until just before it struck the mule; that he looked to the right on approaching the crossing, but not to the left, though he knew that defendant's trains came in from that direction, the view towards the left being obstructed by a shed building. An eye witness of the accident testified that the engine “was running very fast; that no bell was sounded, and no whistle was blown; that the defendant's trains ran fast at that point, to get up the grade; that Grant drove on the track about twenty feet in front of the moving train, and that the speed of the train was not checked before the collision. Another eye witness stated that the train “was going about sixteen or eighteen miles an hour; that the wagon was about thirty feet from the dummy when it undertook

to cross, and that no bell was rung, or whistle blown." Another eye witness "first saw the wagon when the mule was about on the track, and when the engine was about twenty feet from it; that the train was running at the rate of about fifteen miles per hour, and that no bell was being rung, nor other signals given on the train." Carrie Sampson, who was on the wagon at the time of the accident, corroborated Grant. The defendant introduced as witnesses the engineer and fireman of the train, each of whom testified, in substance, that the speed of the train was not more than seven miles per hour; that the head-light was burning, and the bell was ringing, or gong used instead of a bell; that he saw the mule as soon as it came from behind the shed, and it "was in a trot;" and that the engine was reversed, and every effort made to check the train before the collision. An ordinance of the city of Birmingham was read in evidence, which prohibited trains, running forward, from going at a greater rate of speed than eight miles per hour.

"The court's charge to the jury is set out in the opinion of this court, to which the defendant excepted; and exceptions were also reserved to the separate refusal of nine charges in writing asked by defendant. The first and second charges are set out in the opinion, and the others were as follows: 3. "The complaint being against the defendant as a railroad company, the measure of duty of plaintiff's driver is the same as in the case of any railroad in the streets of a city." 4. "The right to run a steam railroad through the streets of a city, when lawfully acquired, is the right to an exclusive right to run its cars on its tracks, except at crossings, subject only to the right of the public to use the same when not in use by the railroad company." 5. "If the jury believe that the defendant's train was not running at a greater rate of speed than eight miles per hour, and that the bell or gong was being rung at short intervals, then defendant was not guilty of negligence." 6. "The care required of the driver was, that before attempting to cross the track he should look to see if trains were passing, or, if his view was so obstructed by buildings that he could not see the track, or an approaching train, that it was his duty to pause and listen; and if he failed to look or listen, this would be negligence on his part, which would defeat plaintiff's right to recover, if the driver, by looking or listening, could have prevented the

injury." 7. "The defendant's failure to comply with the statutes, or city ordinances, in the operation of its trains, did not excuse the driver of plaintiff's wagon from using his senses of sight and hearing before attempting to cross defendant's track; and if, by looking or listening, he could have escaped the danger, the injury is conclusive evidence of negligence, without any reference to the defendant's failure to perform its duty in regard to signals, which will defeat plaintiff's right to recover." 8. "Plaintiff's driver having testified that he knew defendant's trains coming from Avenue E toward First Avenue ran on the track he would cross at the intersection, then it was his duty, before attempting to cross this track, to look in the direction from which such trains would come, or, if the view in that direction was obstructed, to pause and listen for trains; and if he failed to look or listen under these circumstances, this would be negligence, which would defeat a recovery, if, by looking or listening, he could have escaped the injury." 9. "If the jury believe from the evidence that the plaintiff's driver knew that defendant's trains, coming into town, came in on the track which he would first cross; and if they further believe that the view of the track was obstructed in the direction from which the train was coming, then it was his duty to pause and listen before attempting to cross the track, and if he failed to pause and listen, and drove on the track, this would be negligence, which would defeat a recovery, unless the defendant, after discovering the team on the track and in danger, failed to use all means in its power to prevent the injury."

The charge given and the refusal of the several charges asked are assigned as error.

A. T. LONDON, for appellant.

BUSH, BROWN & WEBB, for appellee.

Coleman, J. — Appellee sued defendant to recover damages for killing his mule and injuring his wagon, alleged to have been done by the wrong and negligence of the employees of defendant corporation while operating its engine and cars over its track in the city of Birmingham. The general principles of law to be applied to the evidence of this case as they successively arise are as follows. 1. If the injury sustained by plaintiff resulted as the natural consequence of any wrong or negligence of the defendant, then plaintiff, upon such proof alone, is entitled to recover. 2. That though defendant may have

been guilty of negligence which entitled plaintiff to recover upon this proof alone, if the evidence further showed that plaintiff was guilty of contributory negligence, such contributory negligence would defeat plaintiff's recovery in the absence of other testimony. 3. That although the plaintiff may have been guilty of such contributory negligence as to defeat his recovery, the evidence stopping here, if it further appeared that defendant saw, or might have seen by the exercise of due care, plaintiff's peril in time to have avoided the injury by due care and reasonable diligence on the part of defendant's employees after plaintiff was in peril, and failed to exercise such care and reasonable diligence to avoid the injury, then the defendant corporation would be liable, notwithstanding plaintiff was also guilty of contributory negligence. These principles rest upon sound reasons of justice and public policy, and are sustained by previous decisions of this court. *Gothard v. Ala. Gr. So. R. Co.*, 67 Ala. 118; *Frazer v. S. & N. Ala. R. Co.*, 81 Ala. 199; *M. & E. R. Co. v. Stewart*, 91 Ala. 421. For the safe carriage of passengers and freight railroads are required at all times to exercise due care and diligence, but the law does not demand of them care and diligence to discover the presence of trespassers or persons on their track in unfrequented places. In towns and densely populated cities the duty of vigilance and care on the part of those operating railroads in such places becomes proportionately increased and imperative. On the other hand, where it is known that trains follow or pass each other in rapid succession, the measure of duty required of persons crossing the railroad track to avoid the increased danger of collision is also proportionately increased. A person intending to cross a railroad upon which trains are continually being run, who cannot see up or down the track on account of some obstruction, there being no express or implied invitation by the defendant corporation to cross, and who fails, without a sufficient reason, to stop and listen, is guilty of culpable negligence *per se*. *L. & N. R. Co. v. Webb*, 90 Ala. 185; *L. & N. R. Co. v. Crawford*, 89 Ala. 240, and authorities cited (1). A person wishing to cross

1. See the cases cited in this opinion. *Ala. 240*, is cited in several of the viz. *Gothard v. Ala., Gt. So. R. Co.*, notes appended to the Alabama cases 67 Ala. 118, reported in this volume, p. reported in this volume. 32, *ante*; *L. & N. R. Co. v. Webb*, 90 *Frazer v. S. & N. Ala. R. Co.*, 81 Ala. Ala. 185, reported in this volume, 199, was cited in *M. & E. R. Co. v. post*; *L. & N. R. Co. v. Crawford*, 89 *Stewart*, 91 Ala. 421, 2 Am. Neg.

the track of a railroad at a public crossing, or any place where trains are not required to stop, and seeing a train approaching, and who for himself measures the distance and time it will take to cross, and, acting upon his own judgment, undertakes to cross, assumes the risk, and, if injured, cannot hold the railroad responsible, unless his intention was apparent to the employees of defendant operating the train, and, after such perilous intention and conduct became apparent, by the exercise of due care and reasonable diligence, the injury could have been avoided. The evidence tends to show that there was a space of about twelve feet between the shed which obstructed the view in the direction from which the dummy was approaching and defendant's railroad track; that plaintiff's driver did not look up the track in that direction, and that he did not stop or listen, but continued to drive directly onto the railroad track. Some of the witnesses testified that the mule was moving in a quick walk, while others testified the mule was in a trot. The evidence was also conflicting as to signals of warning and as to a head-light. The evidence tended to show that when the wagon passed the shed the dummy was from twenty to thirty feet from the crossing. The evidence conflicted as to the speed of the engine; some of the witnesses placing it as high as sixteen miles an hour, and others as low as six and a half miles per hour. The city ordinance prohibited the running of trains at a greater rate of speed than eight miles per hour. The engineer and brakeman testified that they saw the wagon when it emerged from behind the shed, and immediately reversed the engine, and used all possible means to stop its further progress. The court charged the jury "that, although plaintiff's driver failed to look or listen before driving on the track, yet if the defendant's train was being run at a greater rate of speed than eight miles an hour, and that thereby the collision was caused, which the defendant might have prevented by the use of due care in the operation of its train, and if its train had been run at a

Cas. 62, where the rule was stated that if the danger to plaintiff might have been avoided by due care on the part of the railroad company's employees after they had discovered the peril, or if the injury would not have been inflicted but for their affirmative act in negligently increasing the speed

of the train, knowing that thereby plaintiff's safety would be imperiled, the defendant company would be liable, notwithstanding plaintiff's own original negligence.

M. & E. R. Co. v. Stewart, 91 Ala. 421, is reported in 2 Am. Neg. Cas. 62.

proper rate of speed, then the negligence of plaintiff's driver in failing to look or listen would not defeat the right to recover by the plaintiff, provided he used due diligence to prevent the collision after becoming aware of the train's approach." The charge, as interpreted by the court, asserts the proposition that, if defendant was guilty of the wrong of running at a more rapid rate than eight miles an hour, as regulated by the city ordinance, this would excuse the plaintiff, although he was guilty of contributory negligence in failing to stop and listen, provided he used due diligence after becoming aware of his peril. The proposition is in conflict with the principles of law declared in this opinion, and, if allowed to prevail, would annul the principle which holds that proximate contributory negligence will prevent a recovery. Although defendant's train may have been running at a more rapid rate of speed than eight miles an hour, and was thereby guilty of negligence or wrong, it was the duty of plaintiff to stop and listen; and, failing in this, he was guilty of proximate contributory negligence. The true rule to be applied to the facts of the case is that, if the defendant was guilty of running at a greater rate of speed than eight miles an hour (or other culpable negligence), though plaintiff was guilty of negligence in failing to stop and listen, such contributory negligence would not prevent a recovery if he used due diligence to prevent the collision after becoming aware of his peril, provided defendant, after plaintiff's peril was apparent, by the use of due care and vigilance, could have avoided the injury. This is the proper rule in cases of contributory negligence. Authorities, *supra*. After contributory negligence sufficient to excuse the defendant from liability has been proven, the burden, according to the facts of the particular case, may shift to the plaintiff to show further negligence on the part of the defendant, which may be necessary, under the foregoing rules of law, to entitle plaintiff to recover. We do not wish to be understood as holding that railroads are relieved of the burden of proof placed upon railroad companies by section 1147 of the Code, but as simply declaring that the same rules of evidence, and the shifting of the burden of proof, apply in suits against railroads as to other parties, except when and in cases where the Legislature, acting within constitutional limitations, may have enacted otherwise; and the court does not commit itself to the further proposition that all the statutory enactments of the Code for the

government and regulation of railroads apply alike to dummy line railroads as to other railroads.

Charge No. 1, requested by defendant, "that if the jury believe the evidence of the driver the plaintiff cannot recover," was properly refused. *Jordan v. Pickett*, 78 Ala. 332. The evidence was in conflict on many material issues submitted to the jury; and the general charge (No. 2) was properly refused. Charges 3 and 4 were irrelevant, and abstract to any question presented in the record. Charges 5, 6, 7, and 8 would have defeated plaintiff's right to recover, although the jury may have been satisfied from the evidence that the defendant failed to use due care, after seeing plaintiff's peril, to avoid the injury. Charge No. 9 was faulty in this: There was evidence tending to show that the engineer and brakeman saw plaintiff's driver as he passed the shed, and before reaching the track. Although the defendant had the right to presume that plaintiff would do his duty, and stop and listen, before attempting to cross the track, yet if plaintiff's conduct at the time was such that it was apparent he did not intend to stop, the defendant was bound to exercise such care as was reasonably practicable to prevent a collision. The charge relieves the defendant from the exercise of due care to avoid the injury from a collision until "the defendant discovered the team *on* the track and in danger." This duty may have arisen before the team was on the track, according to the facts of the case. There was no error in refusing any of these charges. The only error was in the charge given. Reversed and remanded.

GEORGIA PACIFIC RAILWAY COMPANY v. LEE.

Supreme Court, Alabama, November Term, 1890.

[Reported in 92 Ala. 262.]

CROSSING — DUTY TO LOOK AND LISTEN — CONTRIBUTORY NEGLIGENCE. — A person on foot, as well as in vehicle, before crossing a railroad track is required to look and listen, and failure to do so is contributory negligence, which will defeat a recovery in an action for damages; but where a person is driving in a vehicle, having stopped and listened on approaching the track, and his view is obstructed by a train of cars standing on a side track, he cannot be said to be guilty of contributory negligence, as matter of law, because he did not leave his vehicle, and go to a point where he could see that the track was clear; in such case, the question of contributory negligence is for the jury.

GROSS NEGLIGENCE DEFEATING CONTRIBUTORY — WANTONNESS AND RECKLESSNESS. — In such a case the defense of contributory negligence is overcome and defeated by proof of such gross negligence, such recklessness or wantonness, as is the legal equivalent of wilful or intentional wrong; such failure to use all reasonable efforts to avoid the injury, when plaintiff's perilous position was discovered in time to prevent injury by the exercise of due care and diligence. The mere running at a high rate of speed, at a crossing which is not in a populous district, the failure to give the statutory signals on approaching a crossing nor the failure to keep a proper lookout, or other mere omission of duty under circumstances showing mere negligence, is distinguished from recklessness or wantonness.

APPEAL from the City Court of Birmingham. *Judgment reversed.*

“Action by R. N. Lee against the appellant railway corporation to recover damages for the killing of a team and the destruction of a wagon, caused by the alleged negligence of the defendant's employees, in the management of a train, which collided with the plaintiff's team and wagon. The facts are sufficiently set out in the opinion. The court in its general oral charge to the jury charged, among other things: ‘If it appears that the road on which the driver was crossing the railroad was a public road, and that they would have discovered a person in peril on the track, by the use of proper diligence in keeping a lookout, in time to have avoided the accident by the use of all proper means to stop the train, and that they failed to keep such a proper lookout, in that event they would be liable for injuries proximately resulting from such negligence; if the jury should further find that the driver used due diligence in extricating himself and wagon and team after he discovered the danger, because the duty is resting upon those in charge of the train to keep a lookout in such places, and it is not permitted them to shut their eyes, and then say the person on the track ought himself to keep a lookout for the train before going upon the track, and that they did not see him and are therefore excusable.’ The court also charged that, ‘if it appears to the jury that this was a public road crossing, and that they (the employees) saw the peril of the person upon the track, or, if they had been diligent, would have seen him upon the track and discovered his peril in time to avoid the accident, then the plaintiff would be entitled to recover for injuries proximately resulting from such negligence, provided he used proper diligence to escape injury after being apprised of his danger.’ Also, ‘A person going upon the track under such circumstances and at such crossing is

not chargeable with contributory negligence, provided he tries to get out of the way, in cases where it appears that the railroad servants saw him in peril and failed, on their part, to use all the proper means to stop the train and avoid the accident; or when it appears that they would have seen the person, if they had been using proper caution in respect to keeping a lookout, in time to have avoided the accident.' The defendant separately excepted to each of these parts of the general charge. At the request of the plaintiff in writing the court gave the following charges: 1. 'If the jury believe that the injuries occurred at a public road crossing, and that such injuries could have been avoided by the defendant's servants on said train keeping a diligent lookout, then the plaintiff would be entitled to recover, if the driver of the team attempted to escape after discovering his peril.' 2. 'If the jury believe from the evidence that the injuries testified about occurred at a public road crossing, and if they further believe that the bell was not rung or whistle blown at intervals while the train was approaching the crossing, and that such failure to give such signals essentially contributed to bring about such injuries, then the plaintiff would be entitled to recover unless the jury further believe that the driver of the team was guilty of contributory negligence in going on the track, and the plaintiff would be entitled to recover, notwithstanding such negligence, if the injuries were inflicted recklessly, wantonly or intentionally.' 5. 'Even though the jury may believe that the defendant's servants used all means within their power to avert the injury after the peril of plaintiff's team was discovered by them, yet if they further believe that the defendant's train which inflicted the injury (if the injury was inflicted by such train) was being run and conducted by the defendant's servants in a recklessly negligent manner, and that injury to plaintiff's team proximately resulted therefrom, then the jury must find for the plaintiff, even though they should believe that the driver of the team was guilty of negligence in going upon said railroad, if such driver used all means in his power to get the team out of the reach of danger after discovering his peril.' The defendant excepted to the giving of each of these charges; and also to the refusal of the court to give each of the following charges which were asked, among many others, for the defendant: 4. 'If the jury believe from the evidence that the driver of the wagon failed to stop and look and listen before he

attempted to cross the defendant's tracks, and that but for such failure the injury would not have happened, then the plaintiff cannot recover; unless you further believe from the evidence that the defendant's servants in charge of the train, after observing the peril of the wagon and team and occupants of the wagon, wantonly, recklessly or intentionally inflicted the said injury.' 5. 'If the jury believe from the evidence that the manifestation of the peril of the wagon and team and occupants of the wagon, and the collision between them and the train, was so close, in point of time, that the train could not have been stopped in time to have avoided the collision, then the defendant's agents in charge of said train cannot be deemed guilty of wanton, reckless or intentional misconduct.' 11. 'Neither the placing of the cars on the side track, or side tracks, as shown by the evidence, nor a failure to ring the bell of the engine, or blow the whistle, nor the speed of the train, before the peril of the team and driver became manifest, or ought to have been manifest, under the evidence, is evidence of wanton, reckless or intentional misconduct on the part of defendant's servants.' Judgment for plaintiff; defendant appealed and assigned as error the giving of the oral charge by the court, and the rulings of the lower court upon the charges requested by plaintiff and defendant."

JAMES WEATHERLY, for appellant.

CABANISS & WEAKLEY, and LANE & WHITE, for appellee.

McClellan, J. — This is an action for injury to a wagon and team by collision therewith of a train of the defendant (appellant) railway company at a road crossing. The collision occurred at the intersection of Sixth avenue and Twenty-seventh street. This street for at least a block on either side of said avenue, is occupied entirely by three tracks of the defendant's railroad; and the avenue, which is not open beyond these tracks, if, indeed, it extends any further than the line of the street next to the city, constitutes, at most, a public road crossing, which branches off to the right and left as soon as the tracks are cleared. The middle is the main track, and the side track on either hand is only a few feet from it; just far enough, it seems, for passing cars to safely clear each other. The railroad ran north and south. Plaintiff's wagon approached the crossing by a road which ran parallel with the railroad on the east, and within fifteen or twenty feet of the east side track, and turned sharply to the west, opposite the crossing. On the side track next to this

road, and extending up to the crossing, cars were standing; but whether they were flat-cars or box-cars, and consequently whether the driver of plaintiff's wagon could see moving cars on the main track over them, the evidence is conflicting. The evidence is also in conflict as to whether the driver stopped at all near, and before going upon, the crossing. Plaintiff's evidence tends to show that just before turning into the crossing, and when within twenty-five or thirty feet of the point where the main track crosses the roadway, the driver stopped for the purpose of sending back about 100 feet for some articles which he had left, and, while awaiting the return of his errand man, he listened for approaching trains; but that he could not see the main track, or whether any train was approaching on it, because of intervening box-cars on the side track; and that upon the return of his messenger, hearing no noise as of moving cars, he drove immediately into the crossing, and on to the main track and did not and could not see the train which was being backed along that track from the direction in which the cars on the side track extended, until he had gotten past the end of the box-car next to the road he was traveling, by which time his mules were on the main track, where they were almost instantly struck by the cars which were being driven along there by an engine at the other end of the train, several hundred feet away. On the other hand, defendant's evidence goes to show that the driver did not stop at all on approaching on the crossing, either to listen or look for moving cars but drove heedlessly upon the main track, in front of the train, and had he looked he might and would have seen the train, and had he listened he would have heard it, and thus been apprised of the danger in time to have averted the disaster. The evidence was also conflicting as to defendant's negligence, tending to show, in one aspect, that signals with bell and whistle were omitted, and that a very negligent rate of speed was maintained; and, in the other, that the train was moving at a slow pace, and the usual and requisite signals were given. There was no evidence that the trainmen saw the wagon and team approaching the track in time to have stopped the train short of the point of collision, nor does it appear that they omitted any effort to that end after they became aware of the peril of the wagon, mules, and driver. There are conflicts in the testimony as to whether the trainmen could have seen the wagon before it went upon the crossing, as to signals, and as to the

rate of speed at which the train was being run when the wagon was first seen by the employees of the defendant, the witnesses varying from four to twenty miles per hour.

The defenses relied on were the general issue and the contributory negligence of the plaintiff's driver. The rulings of the trial court which are presented for review relate only to the defense of contributory negligence, and matters in replication thereto; the position of plaintiff being that there was evidence tending to show such gross negligence on the part of defendant's employees as would entitle him to a recovery, notwithstanding the driver's own negligence may have contributed to the injury. The evidence as to whether the driver stopped at all as he approached the crossing is, as we have seen, conflicting. One aspect of the testimony goes to show that he did not stop or pause to look or to listen before driving on the crossing, and that, had he done so, he could have both seen and heard the approaching train, and easily have avoided the collision. If this tendency of the evidence involved the real facts, there can be no question but that the driver was so wanting in due care as to deprive the plaintiff, to whom the driver's negligence is imputable, of all right to recover for simple negligence on the part of the defendant. No principle is more firmly established in our jurisprudence, it may be said, than that which fastens upon persons about to go upon or cross over the track of a railway under ordinary circumstances, the absolute duty of stopping and looking and listening for approaching trains; and this duty, subject to a modification to be noted further on, is as incumbent on persons in vehicles as upon those on foot. *Schofield v. C. M. & St. Paul R. Co.*, 114 U. S. 615; *Leak v. Ga. Pac. R. Co.*, 90 Ala. 161; *L. & N. R. Co. v. Crawford*, 89 Ala. 240; *L. & N. R. Co. v. Webb*, 90 Ala. 185 (1).

Another phase of the evidence goes to show that plaintiff's driver stopped the wagon just before turning into the crossing, and when within twenty-five or thirty feet of the intersection of the main track and the road along which he was traveling, for the purpose we have stated, and, remaining stationary at that point for some moments, — minutes perhaps, — listened the while for moving cars, but did not look along the main

1. The *Leak* and *Webb* cases are reported among the Alabama cases in this volume, *post*; and the *Crawford* case is cited in several of the notes to the Alabama cases reported herein.

track because of the intervening box-cars to which we have referred; and, hearing nothing to indicate peril in the attempt to pass over, he drove upon the crossing, and came in collision with the train. On this aspect of the evidence if the driver did stop and listen so near to the main track at the point of its crossing the road as to readily avail himself of the assurance of safety conveyed to him by the absence of any noise indicating the approach of cars, so near as that the situation thus indicated could not and would not have an element of danger injected into it between the time of setting his vehicle again in motion and the time of passing over the track, we cannot affirm, as a matter of law, that the duty was upon him to also look along the track before attempting to cross it, — a duty which could only be discharged in this instance and on this tendency of the evidence, with respect to supervening box-cars, by going in front of the mules, and passing around the end of the car on the side track next to the road. We are not prepared to assert, as a legal proposition, that his failure to alight from the wagon, and, leaving it, go to a point from which he could see along the main track, which the testimony tends to show was the only feasible means of viewing that track, was negligence which would bar plaintiff's recovery for simple negligence on the part of the defendant. The driver could not see an approaching train, while he continued with the wagon on its course, until too late to have averted the disaster. It was not with him to merely turn his head and look to the right and left, as with a person on foot, and to draw back or go forward accordingly as the situation then presented itself; but as he went on his way the peril was incurred and impending; he had reached a point from which he could not draw back before the true situation uncovered itself to his vision. We do not believe it is the custom of prudent men in approaching such crossings, under ordinary circumstances, in a vehicle, to do more than stop and listen, and to look only when that may be done without alighting from and without leaving their conveyances. We do not think that the exercise of due care requires such travelers, under all circumstances, to abandon their teams, and go in advance sufficiently near the track to see along its course, and then resume their vehicle, and attempt a crossing which, perhaps, has become perilous by reason of their delay while taking this precaution against peril, or which might become so in the interval while they are regaining

their conveyance after viewing the track. Moreover, instances may easily be supposed in which it is impracticable to secure a restive or wild team while the driver goes forward to reconnoitre, and in which the danger from leaving it would be more imminent than that involved in attempting a crossing with only the assurance of one's ears as to its safety. With persons on foot, the case is quite different, and palpably so. An instant suffices for them to survey the track, and to act upon such survey. To do so involves no endangering delay, and no inconvenience at any time or under any circumstances. While reaffirming the doctrine of the cases *supra* as to foot travelers, we are not prepared to announce as a proposition of law that plaintiff's driver was guilty of contributory negligence under the facts, which one phase of the evidence tends to support, in failing to gain a point of view which commanded the main track, and adding the assurance of one sense to that of another that no train was approaching, before attempting to cross. The logic of this position is eminently satisfactory, we think, and it is not lacking in the support of adjudged cases, though there are authorities on both sides of it, including an expression in the leading case of *L. & N. R. Co. v. Webb*, 90 Ala. 185, 193. See also, *Beisiegel's Case*, 34 N. Y. 622; *Petty v. H. & St. J. R. Co.*, 88 Mo. 306, there cited, and *P. & R. R. Co. v. Carr*, 99 Pa. St. 505; *Lehigh, etc., R. Co. v. Lear* (Pa.), 9 Atl. Rep. 267; *Donohue v. St. Louis, etc., R. Co.* (Mo.), 2 S. W. Rep. 424; *Pittsburgh, etc., R. Co. v. Mootin*, 8 Amer. & Eng. R. R. Cas. 253; *Artz v. Chic., etc., R. Co.*, 34 Iowa, 160.

It was for the jury to determine, under all the circumstances, whether the driver was negligent in not looking up and down the main track before attempting to cross it. If there were other noises calculated to deaden the noises of an approaching train, it was more incumbent on the driver to look as well as to listen. If it were a part of defendants' line where trains were wont to start near the crossing, so that, after having listened at some distance from the crossing, and heard nothing, a train might be set in motion so as to collide with his vehicle at the crossing, there would be more reason in requiring the driver to see there was no train near by which might be suddenly started. Then, too, the character of the team might be a pertinent inquiry, and whether it was safe to leave it loose, or feasible to secure it, or leave it in charge of another while viewing the road. These and many

other like considerations, serving to mark the lines of due care on the one hand, and a want of it on the other, in particular cases, will readily suggest themselves; and the occasion to keep them in view demonstrates the necessity of submitting the whole question on contributory negligence in this case to the jury.

If the jury believed that part of the testimony in this regard which is most favorable to the defendant, their conclusion that the driver was guilty of contributory negligence necessarily resulted. And they might have reached the same conclusion,—it was open to them to do so—even on the plaintiff's evidence. So finding they should have returned a verdict for the defendant, unless its employees were guilty of such gross negligence, such recklessness or wantonness, as is the legal equivalent of wilful or intentional wrong. Many of the rulings of the trial court in defining the gross negligence, recklessness, or wantonness on the part of the defendant which will authorize recovery, notwithstanding plaintiff's contributory negligence, are presented for review. The fault in the court's definitions in this regard lies, in our opinion, in the assumption that recklessness or wantonness, implying wilful and intentional wrong-doing, may be predicated of a mere omission of duty, under circumstances which do not of themselves impute to the person so failing to discharge the duty a sense of the probable consequences of the omission. The charges given by the court in this connection, and its rulings on charges requested by the defendant, proceed on the theory that a mere failure on the part of defendant's employees to see plaintiff's wagon and team, as soon as they might have seen them by the exercise of due care, was such recklessness or wantonness as implies a willingness or a purpose on their part to inflict the injury complained of. We do not think this proposition can be maintained either logically or upon the authorities. The failure to keep a lookout, which it was the duty of defendant's employees to maintain, and which would sooner disclose the peril of the driver and plaintiff's wagon and team, — even conceding that such would have been the case, — was, at the most, mere negligence, inattention, inadvertence; and it cannot be conceived, in the nature of things, how a purpose to accomplish a given result can be imputed to mental conditions the very essence of which is the absence of all thought on the particular subject. To say that one intends a result which springs solely from his mind, not addressing itself to the factors

which conduce to it, to imply a purpose to do a thing from inadvertence in respect of it, are contradictions in terms. Wilful and intentional wrong, a willingness to inflict injury, cannot be imputed to one who is without consciousness, from whatever cause, that his conduct will inevitably or probably lead to wrong and injury. In the case at bar this consciousness could not exist on the part of defendant's employees until they knew plaintiff's wagon and team were in a position of danger; and no degree of ignorance on their part of this state of things, however reprehensible in itself, could supply this element of conscious wrong, or reckless indifference to consequences, which from their point of view would probably or necessarily ensue. The true doctrine, and that supported by many decisions of this court, as well as the great weight of authority in other jurisdictions, is that, notwithstanding plaintiff's contributory negligence, he may yet recover if, in a case like this, the defendant's employees *discover the perilous situation in time to prevent disaster, by the exercise of due care and diligence, and fail after the peril of plaintiff's property becomes known to them as a fact* — and not merely after they should have known it to resort to all reasonable effort to avoid the injury. Such failure, with such knowledge of the situation, and the probable consequences of the omission to act upon the dictates of prudence and diligence, to the end of neutralizing plaintiff's fault, and averting disaster notwithstanding his lack of care, is, strictly speaking, not negligence at all, though the term "gross negligence" has been so frequently used as defining it that it is perhaps too late, if otherwise desirable, to eradicate what is said to be an unscientific definition, if not, indeed, a misnomer; but it is more than any degree of negligence, inattention, or inadvertence, — which can never mean other than the omission of action without intent, existing or imputed, to commit wrong, — it is that recklessness, or wantonness, or worse, which implies a willingness to inflict the impending injury, or a wilfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate a wrong. The theory of contributory negligence, as a defense, is that, conjointly with negligence on the part of the defendant, it conduces to the damnifying result, and defeats any action the gravamen of which is such negligence. If defendant's conduct is not merely negligent, but worse, there is nothing for plaintiff's want of care to contribute to — there is no lack of mere prudence and diligence

of like kind on the part of the defendant to conjunctively constitute the efficient cause. Mere negligence on the one hand cannot be said to aid wilfulness on the other. And hence such negligence of a plaintiff is no defense against the consequences of the wilfulness of the defendant. But nothing short of the elements of actual knowledge of the situation on the part of defendant's employees, and their omission of preventive effort after that knowledge is brought home to them, when there is reasonable prospect that such effort will avail, will suffice to avoid the defense of contributory negligence on the part of, or imputable to, the plaintiff. *Beach, Contrib. Neg.*, pp. 66, 67, 68; *Tanner v. L. & N. R. Co.*, 60 Ala. 621; *Gothard v. A. G. S. R. Co.*, 67 Ala. 114; *L. & N. R. Co. v. Crawford*, 89 Ala. 240; *Leak v. Ga. Pac. R. Co.*, 90 Ala. 161; *L. & N. R. Co. v. Webb*, 90 Ala. 185; *M. & E. R. Co. v. Stewart*, 91 Ala. 421, 2 Am. Neg. Cas. 62. Certain parts of the court's general charge to which exceptions were reserved, and its action in giving charges numbered 1 and 2, requested by plaintiff, and in refusing charge 5 of defendant's series, are not in harmony with the foregoing principles.

Certain other rulings are to the effect that, if the jury found that the train which inflicted the injury, if injury was inflicted, etc., was being run by defendant's servants in a recklessly negligent manner, and that the injury proximately resulted therefrom, recovery might be had, notwithstanding plaintiff's contributory negligence, and notwithstanding defendant's employees used all means in their power to avert the injury after the peril became manifest to them. It is true there is what may be termed a shading of the doctrine we have been considering, to the effect that to run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers, — facts known to those in charge of the train, — as that they will be held to a knowledge of the probable consequences of maintaining great speed without warnings, so as to impute to them reckless indifference in respect thereto, would render their employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger. The doctrine is not based on the idea that they ought

to have sooner observed the danger, however, but on the ground that they knew of its existence, — of the presence of people in positions of peril, as a matter of fact, without seeing them at all in the particular instance. We fully subscribe to this doctrine, but deny its application in the case at bar. Some of the evidence went to show that this train was running at from fifteen to twenty-five miles an hour, and that no signals were being given. But, conceding that such a rate of speed and such absence of warnings might stand for recklessness and wantonness in approaching a crowded thoroughfare, the locality here involved is not shown by any tendency of the evidence to have been of that character. At most, it was but the crossing of a considerably traveled public road over the railway, and there was nothing in the situation, assuming that it was well known to the trainmen, to justify the imputation to them of a consciousness that a natural or probable result of their conduct would be the infliction of injury to persons or property at that point. We apprehend that the maintenance of even a high rate of speed, and omission to give signals, in approaching such a crossing, can be no more than negligence, in an action counting on which contributory negligence would be a good defense. Charge 5, asked by plaintiff, should not, and charge 11, refused to defendant, should, therefore, have been given. *H. A. & B. R. Co. v. Sampson*, 91 Ala. 560. In all we have said with respect to the conduct of plaintiff's driver, we have assumed that, in any respect, it involved only negligence, as distinguished from recklessness or wantonness. It is the opinion of my associates, which they desire stated here for the purpose of preventing misunderstanding, that if the party injured is himself guilty of wanton and reckless conduct, importing the needless incurring of danger with a sense of the natural or probable consequences to himself, he may not recover, even though the defendant's employees were also reckless or wanton in such sort as to imply a willingness to inflict the injury.

The only possible remaining contention upon which it is sought to predicate recklessness or wantonness of defendant's servants is the supposed want of proper care and diligence on their part to aver the disaster after they became aware of the perilous position of plaintiff's property. It will suffice to say in this connection that there is no evidence of any want of proper care and diligence in this regard. On the contrary, the evidence is full to

the point that they did all that the situation demanded of them, after the peril became manifest. The charges requested by defendant, to the effect that there was no evidence of reckless, wanton, or intentional misconduct, and those which proceeded on that theory, should have been given. The general charge asked by defendant was well refused. It was requested on the assumption that plaintiff's driver was, on the uncontroverted evidence, guilty of negligence, as a matter of law, which contributed proximately to the result. That, as we have seen, was for the determination of the jury. Charge 4 requested by defendant was faulty, in that it asserts as a matter of law that it was the duty of the driver to stop and listen *and* look, when, as we have attempted to demonstrate, it was open to the jury on the evidence to find that his full duty was discharged if he stopped and listened, and omitted to look.

The judgment of the City Court is reversed, and the cause remanded.

STANTON v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Supreme Court, Alabama, November Term, 1890.

[Reported in 91 Ala. 382.]

COMPLAINT — BREVITY — AVERMENTS OF NEGLIGENCE. — Under Alabama Code, sec. 2664, a general averment of negligence on the part of defendant's servants, and consequent injury to plaintiff's horse, is sufficient without a statement of the particular facts; but, where the particular facts are stated, they must show that the injuries were the natural consequences thereof, and that the damages were not too remote.

CROSSING — FRIGHTENING HORSE BY NOISES — LIABILITY FOR DAMAGES SUSTAINED. — A railroad company has the right in operating its road, to make all the noises incident to the movement and working of its engines, including the escape of steam, and the giving of proper and usual signals, by blowing the whistle and ringing the bell, and where a horse attached to a buggy passing over a public crossing, becoming frightened at the noises or movement of the train, runs away and is injured, the owner has no cause of action against the railroad company, unless the acts of its servants, which caused the fright of the horse, were wanton and malicious, and were done in the discharge of their business for the company.

OBSTRUCTION BY RAILWAY TRAIN — QUÆRE. — Whether a railroad company is responsible for wrongfully or negligently delaying a traveler on the highway at a public road crossing, by allowing a train of cars to remain stationary on the track at the crossing.

CONSEQUENTIAL AND REMOTE DAMAGES. — If there is any liability on the part of a railroad for damage to a traveler by reason of blocking a public crossing with a train, it extends only to the damages which are the natural consequences of the delay, and does not extend to damages caused by another train coming up, blowing off steam, frightening the traveler's horse, and causing him to run away.

APPEAL from the Circuit Court of Escambia. *Judgment affirmed.*

“ This action was brought to recover damages, as alleged in the first count of the complaint, ‘ for the destruction and injury of a certain mare, buggy and harness, the property of plaintiff, caused by reason of the negligence and omissions of duty of defendant's agents or servants by wrongfully obstructing the public road crossing over defendant's railroad, and running another one of its trains up and across said crossing while so obstructed by the first, at or near the public road crossing at Pensacola Junction, or Flomaton, in said county, on the 15th March, 1889.’ A second count was as follows: ‘ Plaintiff claims of defendant, also, the further sum of \$300 damages for injuries to, and destruction of a mare, buggy and harness, the property of plaintiff, by reason of the wrongful acts and omissions of duty by the defendant, through its employees and servants, (for) that whereas, on the 15th March, 1889, plaintiff, while traveling with his said mare hitched to his buggy, on the public dirt road which crosses defendant's railroad track, at or near Flomaton in said county, when he arrived at the public crossing of said road and track, a long train of cars, placed and allowed to stand there by the wrongful act or omission of duty by defendant's employees, was there standing directly across said public crossing, and so remained for a half hour or more, by the negligence and fault of defendant's employees; by reason of which, plaintiff was delayed and prevented all that time from crossing with his horse and buggy, and until a running train of defendant's cars, at the regular time due at the place, approached and came up to said crossing with great and unusual noise, blowing off steam, and before said first train of cars had been moved from across said public crossing; whereby, and on account of which, plaintiff's said mare became and was so frightened that, although he was endeavoring to hold and control her, she broke loose from him, and ran off, breaking and destroying the buggy and harness, and greatly injuring said mare, by which he has sustained special damages in the sum of \$250. And plaintiff avers and alleges,

also, that he has been damaged in the further sum of \$50, by the wrongful acts and omissions of defendant's employees in wrongfully placing and allowing said train of cars to remain across said public road crossing at the time and place aforesaid, in being thereby delayed and annoyed at said crossing as above stated, and by being there left on foot forty miles from home, and compelled to pursue his said mare eighteen miles before overtaking her, where he found her greatly damaged; all by the wrongful act or omission of defendant. To plaintiff's damage as above stated.' The court sustained a demurrer to the second count, and the defendant pleaded the general issue to the first count. On the trial, the plaintiff's witnesses testified to facts substantially as alleged in the second count of the complaint. The defendant introduced no evidence. The court charged the jury to find for the defendant, if they believed the evidence; to which charge the plaintiffs excepted. The charge of the court, and the ruling on the demurrer to the second count of the complaint, were assigned as error."

J. W. POSEY, for appellant.

J. M. FALKNER, for appellee.

Coleman, J.—All the pleading must be as brief as is consistent with perspicuity and the presentation of the facts or matter to be put in issue in an intelligible form. No objection can be allowed for defect in form, if facts are so presented that a material issue in law or fact can be taken by the adverse party. Code, § 2664. In the case of *S. & N. Ala. R. Co. v. Thompson*, 62 Ala. 494, the complaint contained two counts, neither of which averred any special acts or omissions as constituting negligence. Each contained the general averment that the injury complained of was the result of the negligence or want of skill of defendant's employees in the management or running of said train, locomotive, cars, etc. It was held the complaint was sufficient. In *West. R. Co. v. Lazarus*, 88 Ala. 453, the averment in the complaint was that "the engine was so negligently operated by defendant's agents that plaintiff's cow was killed, and that said cow was killed on account of said negligence." This was held to be sufficient, on the ground that any averment which shows that the negligence of the defendant either caused or reasonably contributed to the injury complained of, or that the injury resulted from such negligence, is sufficient. *West. R. Co. v. Lazarus*, 88 Ala. 453, 456. Notwithstanding the

liberal construction given to section 2664 of the Code, and applied to pleadings, if the facts averred *prima facie* show the damages claimed were not the natural consequences of the negligence complained of, or were too remote to be held as the cause of the damage, such pleadings are demurrable, although the complaint ends with the general averment that the injury complained of was the result of such wrongful or negligent acts or omissions. So far as the complaint avers the wrong or negligence of the defendant consisted in obstructing the public road with its trains, as the cause of damage and injury to the harness, buggy, and mare, such averments do not show that the negligence caused or reasonably contributed to the injury. There is no sufficient causal connection between the act complained of and the injury. The demurrer to the second count was properly sustained.

No evidence was introduced by the defendant, and the facts of the case are very few, and may be briefly stated as follows: The plaintiff, traveling in his buggy on the public road, came to a crossing of defendant's track. A train of cars was on the track across the road, which obstructed his further progress. After waiting for half an hour or more a second train of cars and engine run up on the side track, "blowing off steam, and making unusual noise," and stopped where plaintiff was with his mare and buggy, and then reversed the engine, run back a piece, and then forward along by plaintiff and his mare and buggy, and stopped at a point also across the public road. At the approach of this train the mare became frightened, broke loose from plaintiff, and ran away, injuring herself and the harness and buggy. Suit was brought to recover damages sustained. After hearing the evidence, the court gave the general charge in favor of the defendant. The law in such cases may be stated as follows: The authority to operate a railroad includes the right to make the noise incident to the movement and working of its engines, as in the escape of steam and the rattling of cars; and also to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells. It is not liable for injuries occasioned by horses, when being driven on the highway, taking fright at noises occasioned by the lawful and reasonable exercise of these rights and duties. But if the acts of the servants occasioning the fright are wanton and malicious, and be done in the discharge of their business, by using the appliances of the company, such as wanton whistling of the engine and the reckless discharge of steam, the

company will be liable. 1 Ror. R. R., p. 704; Pierce, Ry., p. 348. In the case of *Whitney v. Maine Central R. Co.*, 69 Me. 208, the law was declared in the following terms: "A traveler upon a highway, and a railroad corporation with their trains, in approaching a crossing, are each bound to use their privilege with such reasonable precaution, prudence, and actual diligence as to enable the one to cross in safety to the other, and the corporation has the right to make all reasonable and usual noises incident to running their trains." It is the duty of trains nearing a public crossing to make such signals to warn persons approaching the track that they may stop at a safe distance. Code, § 1144. In the case of *Philadelphia, W. & B. R. Co. v. Stinger*, in commenting on the facts, the court stated that "when a man drives an unbroken or vicious horse, or one that is easily frightened by a locomotive, along a public road running side by side with a railroad, and liable to be met or overtaken by a train, he does so at his own risk. The railroad had as high a right to move their trains upon their road as the plaintiff had to drive his horse along the public road. Both were bound to the exercise of care in accordance with the circumstances of the case." In the case just cited there was some evidence tending to show an unnecessary blowing of the whistle, and it was held to be proper to leave to the jury to determine whether the whistle was used in such a wanton manner as to amount to negligence. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219, 226. It is a general principle that the wrongful and negligent acts complained of must be the efficient cause of the damage sustained. Whether directly or indirectly, the damage must be the natural consequences of the wrong. 5 Amer. & Eng. Enc. Law, 5. The fright of the horse and its running away was not the natural consequence of permitting the cars to remain on the crossing. This may have contributed remotely to that result by the delay of the plaintiff until another train reached the spot, but the efficient cause which frightened the horse, and made it run away, was the "blowing off steam" and "unusual noise" of the train which came up while plaintiff was waiting to cross. The damages resulting from the fright of the horse were too remote, as a consequence of the obstruction of the public road, to be visited upon the defendant corporation for that cause. We do not hold that a railroad may not be responsible for wrongfully or negligently delaying a person at a crossing, but the damages in such

case must be the natural consequences of the delay, and not those produced by a subsequent, independent, intervening, and efficient cause. It follows, therefore, that if plaintiff is entitled to recover, it must be on account of the "blowing off steam and unusual noise" of the engine, which frightened plaintiff's horse and caused it to run away. Applying the principles of law applicable, as above declared, to the evidence in the case, we do not think there is sufficient proof to authorize a verdict for plaintiff. No evidence was introduced which tended to show any wanton or reckless "blowing off steam," or unnecessary use of the engine and movement of the train. In what way the "unusual noise" mentioned in the bill of exceptions was produced, or whether it was a noise unusual to the mare only, or of a character not incident to the running of the train, is not shown. Noise may be unusual to persons or things not accustomed to it, and usual as signals and incident to the running and movements of a train. The damage resulted from the fright of the mare, and as the railroad corporation had the right to use its track, and make the required signals, at a public crossing, and all the usual noises incident to the running and moving of its trains, it was incumbent on the plaintiff to show that the blowing off the steam and the making of the noise complained of was unnecessary, and recklessly or wantonly done, or with the intention to frighten the mare. There is no evidence of this character in the record. Consequently we hold there was no error in the charge of the court to find for the defendant.

Affirmed.

PATTERSON v. SOUTH AND NORTH ALABAMA RAILROAD COMPANY.

Supreme Court, Alabama, November Term, 1889.

[Reported in 89 Ala. 318]

EVIDENCE — EXPERT — PHYSICIAN'S OPINION AS TO CAUSE OF INJURIES — PLACE OF INJURIES. — A physician may, after a personal examination, testify as an expert to the nature and extent of plaintiff's injuries, and may state his opinion that they were caused by a fall, but where he personally knows nothing of the facts, he cannot state that they were caused by a fall from a horse at a particular railroad crossing described in the complaint.

DEFECTIVE CROSSING — INJURY — HABIT OF MULE FOR STUMBLING — CONTRIBUTORY NEGLIGENCE. — Where the plaintiff was injured by her mule falling through a hole in a bridge over a railroad crossing, the habit of the animal for stumbling is relevant to the question of contributory negligence; and a witness may testify to his "character" for stumbling when witness understood the word used to refer to the "habit" of the mule in this respect.

EXEMPLARY DAMAGES. — Where it is sought to recover damages on account of personal injuries, caused by negligence on the part of the defendant, exemplary or vindictive damages cannot be allowed for any want of care on defendant's part less than gross negligence.

DUTY TO KEEP IN REPAIR. — If a railroad company constructs its road across a public road or highway, the duty devolves on it to put and keep the crossing and approaches thereto in proper repair for the use of the traveling public; but this duty will be sufficiently discharged, if they are maintained in a reasonably safe and convenient condition, so as not to materially impair the usefulness of the highway, or interfere with its safe enjoyment by travelers who exercise ordinary care and prudence.

CONTRIBUTORY NEGLIGENCE. — Where a person, in passing over a railroad crossing, rides to one side of the bridge, out of the route usually traveled, and which she could have used with safety, and was injured by her horse there stepping into a hole, this would presumptively be a want of ordinary care, and would constitute such contributory negligence as will prevent a recovery.

APPEAL from the Circuit Court of Cullman. *Judgment affirmed.*

" This action was brought to recover damages for personal injuries sustained while riding over a railroad crossing on the defendant's road, and was caused by the mule stepping into a hole or defective place in one of the timbers. At that place there was a ditch on the side of the railroad track, over which the defendant had constructed a bridge, or crossing, by laying cross-ties together. The evidence was conflicting as to the width of the crossing, but tended to show that the hole, or defective place into which the plaintiff's mule stepped and fell, was near the edge or side of the crossing, outside of the track or route usually traveled. The plaintiff took the deposition of Dr. E. M. Sams, who testified to the nature and extent of her injuries from an examination made by him 'two or three years' after the accident occurred; and among other things he stated: 'My opinion is, that said injuries were caused by a fall from a mule or horse falling through a crossing on the railroad at Cedar crossing.' This statement was excluded by the court, on motion of the defendant, and plaintiffs excepted. The defendant asked D. M. Patterson, on cross-examination, 'what was the character of said

mule for stumbling?' to which he answered, that the mule 'was clear-footed,' but, in answer to another question, 'admitted that the mule had once fallen down with him in the public road;' and to each of these questions the plaintiffs objected and excepted. A witness for the defendant was also asked 'the character of said mule for stumbling,' and answered, 'that it was bad;' to which question and answer each the plaintiffs objected and excepted. The court gave numerous charges to the jury at the instance of the defendant, and among them the following: 9. 'The plaintiff is not entitled to recover smart money or vindictive damages, unless they believe from the evidence that the defendant was guilty of gross negligence.' 10. 'If the jury believe from the evidence that Mrs. Patterson by her acts proximately caused her injury, then the plaintiffs are not entitled to recover.' 13. 'If the jury believe from the evidence that the said bridge at the crossing was maintained by the defendant in such manner as not unnecessarily to impair the usefulness of said public road, or to interfere with the safe enjoyment of said road, then the defendant is not liable.' 17. 'If the jury believe that if Mrs. Patterson, in attempting to cross the bridge in question, had followed the usual and ordinary method of crossing it by the general public, she would not have been in any danger; and if they find from the evidence that she was hurt, if at all, by riding near the ends of the cross-ties, which place was out of the usual line of travel, then, in riding where she did, she so far contributed to her own injury as to prevent a recovery in this case.' 18. 'If the jury believe from the evidence that Mrs. Patterson was negligent in attempting to cross said bridge, by riding out of the usual route taken by the traveling public, when she could have crossed it with safety to herself by keeping in the usual route, then she so far contributed to the accident and injury as to prevent any recovery in this case, and the jury must find for the defendant.' 25. 'If the jury believe from the evidence that, at the time of the accident, the bridge in question was reasonably safe and convenient for the traveling public, exercising ordinary care and prudence for their own safety, they must find for the defendant.' The plaintiffs excepted to each of these charges, and they now assign the same as error, with the rulings on the pleadings and evidence."

W. T. L. COFER, for appellants.

GEO. H. PARKER, and HAMILL & LUSK, for appellee.

Somerville, J. — 1. It was competent for the witness Dr. Sams to give his opinion, as an expert, that the injuries of the plaintiff, Mrs. Patterson, were caused by a fall of some kind, but not by a fall from a mule or horse at a particular railroad crossing, as to the facts of which he neither knew, nor pretended to know, anything. The evidence bearing on this point was properly excluded.

2. The evidence tended to show that the injury complained of was received by reason of the plaintiff's mule falling through a hole in a bridge. The habit of the animal for stumbling was a relevant fact, in view of the liability of such a vice to contribute to such an accident. The evidence bearing on this point was properly admitted to throw light on the inquiry as to any alleged contributory negligence on the plaintiff's part which may have produced the injury. It is sufficiently obvious that the inquiry as to the "character" of the animal for stumbling had reference to habit, and was so understood by the witnesses.

3. The court properly charged the jury that there could be no recovery of exemplary or vindictive damages by reason of any want of care on defendant's part less than gross negligence. *South & North Ala. R. Co. v. McLendon*, 63 Ala. 266; *Lienkauff v. Morris*, 66 Ala. 406; *West. Union Tel. Co. v. Way*, 83 Ala. 542.

4. If a railroad company constructs its road across a public road or highway, the duty devolves upon it to put and keep the approaches and crossing in proper repair for the use of the traveling public. This duty will be sufficiently discharged if the highway is maintained in a reasonably safe and convenient condition so as not to materially impair its usefulness, or interfere with its safe enjoyment by travelers, who exercise ordinary care and prudence for their own safety in using it. *Pratt Coal Co. v. Davis*, 79 Ala. 308; *S. & N. Ala. R. Co. v. McLendon*, 63 Ala. 266, 9 Am. and Eng. Encyc. Law, 411; *Shearman & Redfield on Neg.*, §§ 357, 451, 452. Charges numbered 13 and 25 harmonize entirely with this view of the law.

5. We perceive no error in the court's giving instructions numbered 17 and 18, requested by the plaintiff. If the plaintiff Mrs. Patterson was so negligent as to ride out of the usual route of travel, commonly used by others, and which could have been used with safety by herself, on the occasion of her injury, and was hurt by riding near the end of the bridge, this would presumptively be

a want of ordinary care, such as would defeat recovery, provided it contributed to such injury. The instructions assert nothing more than this.

6. The record does not show the rulings of the court on the several demurrers with sufficient certainty to enable us to pass on them intelligently; nor do the assignments of error, based on these rulings, appear to be insisted on in argument. We decline, therefore, to consider them. The other rulings of the court seem to be free from error, and the judgment is affirmed.

BIRMINGHAM MINERAL RAILROAD COMPANY v. JACOBS.

Supreme Court, Alabama, November Term, 1892.

[Reported in 101 Ala. 149.]

CROSSING OF RAILROADS — COLLISION — WANTON OR WILFUL NEGLIGENCE — The evidence examined and held not to show that the collision was wilfully caused by defendant's agents.

STATUTORY REQUIREMENT — RIGHT TO PRESUME IT WILL BE COMPLIED WITH. — Under sec. 1145 of the Georgia Code, engineers and conductors must cause the train of which they have charge to stop within 100 feet of the crossing of another railroad. An engineer when approaching a crossing has a right to presume that the employees upon a train on an intersecting road will comply with this statute, and when, in an action against a railroad for the killing of an engineer on an intersecting road caused by a collision at the crossing, caused by a failure to stop within the distance required by law, it will be presumed, without further evidence, that the injury was caused by the negligence of the defendant (1).

1. *Railroad crossings — Statutory provisions — Failure to perform duty.* — In the case of *B. M. R. Co. v. Jacobs*, 92 Ala. 187, (fully discussing the statutory provisions, reciting these sections, pp. 193, 194), it is said that under Ala. Code, sec. 1145, where two railroads cross, engineers and conductors are required to stop their trains within 100 feet of the crossing, and not proceed until they know the way is clear, the fact that such stoppage leaves the rear car standing across the track of another railroad, does not excuse the failure to perform this duty.

As to failure to comply with statutory requirements, see *A. G. S. R. Co. v. Linn*, 103 Ala. 134; *Ensley R. Co. v. Chewning*, 93 Ala. 24.

Suddenly backing after crossing. — In the case of *K. C. M. & B. R. Co. v. Locky*, 114 Ala. 152, defendant was held liable where the train after passing the crossing was suddenly backed thereon in front of an engine passing on the cross road.

Injury to passenger — Liability. — Where a personal injury occurs to a passenger upon a train by reason of a collision at the crossing of railways by

OLDER RIGHT OF WAY — DUTY OF ENGINEER TO KEEP LOOKOUT.

— When approaching a railway crossing, an engineer of a railroad having the older right of way may presume that the employees of a train on the intersecting road will stop their train as required by law, yet it is his duty to keep a lookout for approaching trains; and if the facts reasonably indicate that the approaching train on the intersecting road is not going to stop at said crossing, and the engineer attempts to cross, he is chargeable with negligence.

CONTRIBUTORY NEGLIGENCE — QUESTION FOR THE JURY. — Where an action is brought against a railroad to recover damages for injuries alleged to have been sustained by reason of negligence of the defendant, whether the damage complained of was occasioned entirely by the negligence of the defendant or its employees, or whether the plaintiff by his own negligence so far contributed to the injury, that but for such contributory negligence on his part the injury would not have been inflicted, are questions for the determination of the jury under proper instructions from the court.

CHARGE MAKING IGNORANCE OF LAW, EXCUSE, PROPERLY REFUSED. — In an action for the alleged negligent killing of plaintiff's intestate by a collision between trains, a charge that, "if the jury find for the plaintiff, in assessing the damages as a punishment to the defendant, they might look to the fact that at the time of the alleged injury the law was in some doubt as to whether a dummy railroad was a railroad within the meaning of the statute, requiring the stoppage of trains within 100 feet of the crossing of a railroad," is properly refused, because the charge makes the alleged ignorance of the law on the part of the defendant's employees, an excuse for its violation.

CHARGE DEFECTIVE IN COMPREHENSIVENESS PROPERLY REFUSED. — In an action in such a case for the alleged negligence of defendant's "engineer, conductor, servants or agents," in charge of the train, an instruction that the jury "cannot find from the evidence that the engineer in charge of the engine propelling defendant's freight train was guilty of negligence," is properly refused, for the reason that if the engineer was not negligent, other employees of the defendant's train, upon whom rested duties, might have been, and whether they were is a question for the jury.

MISLEADING CHARGE PROPERLY REFUSED. — A charge is properly refused which is calculated to mislead the jury, or which asserts a principle not applicable to the case, or which seeks to take from the jury the consideration of the negligence of the defendants or its employees.

APPEAL from the Circuit Court of Jefferson. *Judgment affirmed.*

"Action on the case, brought by Hannah Jacobs, the appellee, as administratrix of the estate of Peter Jacobs, deceased,

reason of the failure to observe the and that fact that he alleges such negligence in the alternative will not defeat his rights to recovery. Highland Ave. & Belt R. Co. v. Swope, 115 Ala. passenger injured by reason thereof, 787.

against the Birmingham Mineral Railroad Company, to recover damages for the alleged wrongful and negligent killing of plaintiff's intestate. The death resulted from a collision of one of the defendant's freight trains with an engine and train of the Ensley Railway, a dummy line, at the point of intersection of the defendant's road with the Ensley Railway; the plaintiff's intestate being the engineer on the dummy engine. The negligence complained of is alleged as follows in the third count of the complaint: 'That defendant, through its engineer, conductor, servants, and agents aforesaid, so in charge of defendant's said engine and train, negligently and carelessly failed to cause its said engine and train to come to a full stop within one hundred feet of the said crossing, and negligently proceeded before they knew the way to be clear. And defendant, through its servants and agents, negligently and carelessly managed, run and operated said engine and train; negligently run said train toward and to said crossing at a high rate of speed, and negligently run said train backward towards and to said crossing, and negligently run said train towards and to said crossing without keeping a proper lookout by reason of which said negligence and carelessness of defendant, its said train ran against the said engine and train upon which plaintiff was as aforesaid, in consequence of which plaintiff's intestate was so injured that he died.' The other facts of the case, as disclosed on this appeal, are sufficiently stated in the opinion. Among the written charges requested by the defendant, and to the refusal to give each of which the defendant separately excepted, were the following: 5. 'If you believe the evidence, the defendant's train was approaching the dummy track in plain view of the first railroad crossing reached by the dummy train, when the dummy engine was on such crossing.' 6. 'If you believe the evidence, the defendant's train was approaching the dummy track in plain view of the first railroad crossing reached by the dummy train, when the dummy engine was on such crossing, and there is no evidence tending to show that defendant's train at such time and from such place was hid by the banks of any cut or other obstruction.' 7. 'If you believe the evidence, there was nothing to prevent the plaintiff's intestate from seeing the defendant's approaching train when the dummy engine was on the railroad crossing first reached by it.' 8. 'If the jury find for the plaintiff, in assessing the damages as a punishment to defendant, they may look to the fact that at the

time of the alleged injury, the law was in some doubt as to whether the Ensley Dummy road was a railroad within the meaning of the statute requiring the stoppage of trains within one hundred feet of the crossing of a railroad.' 12. 'You cannot find from the evidence that the engineer in charge of the engine propelling the defendant's freight train was guilty of negligence.' 16. 'I charge you, gentlemen of the jury, that an engineer in charge of an engine propelling a passenger train, should exercise more care than an engineer in charge of an engine propelling a freight train.' 19. 'I charge you, gentlemen of the jury, that if you shall believe from the evidence that the defendant's servants managing and controlling defendant's train failed to stop defendant's train within one hundred feet of the crossing of the dummy track, and if you shall further believe from the evidence that at the time defendant's servants failed to stop said train they did not know and had no good reason to believe that the dummy train was about to cross defendant's track, then the failure to make such a stop would not be negligence on the part of the defendant's employees.' 20. 'It was the duty of the plaintiff's intestate to know that the way across defendant's track was clear, or to look up and down the defendant's track to see if a train was approaching thereon, before he attempted to cross the same with his dummy engine and train, and if the jury believe from the evidence that by looking up and down defendant's track he could have seen the approach of defendant's train in time to have avoided the injury, then you must find for the defendant.' 21. 'If the jury believe from the evidence that plaintiff's intestate could have seen defendant's train approaching the crossing in time to have avoided the injury by looking, and that he omitted to look, or looking saw defendant's train approaching the crossing and near thereto, and he undertook to cross his dummy engine across in front of such approaching train of defendant, he was guilty of such negligence as will preclude recovery in this action.' 22. 'Although the jury may believe from the evidence that the servants and agents of defendant neglected to use due care and diligence to avoid the collision, this did not relieve the plaintiff's intestate from the necessity of taking due care and precaution for his safety. Before attempting to cross the railroad track of defendant with his dummy engine and train, plaintiff's intestate was bound to use his senses to look and to listen for an approaching train on defendant's track in order to avoid a

collision in this case. If he omitted to use his senses of sight and hearing, and propelled his dummy engine thoughtlessly on the track of defendant's railroad, or, if using them, he saw or heard the approaching train of defendant on the track, and instead of waiting for it to pass, he undertook to cross the track of defendant's railroad with his dummy engine and train in front of defendant's approaching train and was injured thereby, he so far contributed to the injury complained of in this complaint as to deprive the plaintiff of any right of recovery.' 23.. 'The only negligence for which the plaintiff can recover, under the evidence in this case, is the negligence of the conductor in not stopping defendant's freight train before crossing the dummy track, if the jury believe, from the evidence, that said freight train did not stop for such crossing.' 27. 'The court charges the jury that an engineer pulling a passenger train with passengers aboard his train, who sees a freight train approaching the crossing of his railroad and another railroad, and said freight train, when so seen, is near enough to collide with the passenger train, unless such freight train should be brought to a stop, provided the passenger train should proceed to cross in front of the approaching freight, the said passenger train should not attempt to cross before such approaching freight train, and if the engineer of such passenger train should so attempt to cross and should be injured and killed thereby, then I charge you that in such case there could be no recovery by the administrator of such engineer, unless the injury was inflicted wilfully, wantonly or recklessly.' 29. 'If the jury believe from the evidence in this case that the plaintiff's intestate could have discovered the approach of defendant's train by the exercise of ordinary care, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant.' 30. 'It was the duty of plaintiff's intestate to have kept a vigilant lookout for an approaching train on defendant's track, and if the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train by the exercise of ordinary care and diligence, such as an ordinarily prudent man would have exercised, under like circumstances, in time to have avoided the alleged injury, they must find for the defendant.' 31. 'If the jury believe from the evidence that the plaintiff's intestate could have seen the approach of defendant's train by looking, in time to have avoided the injury, and that he

failed to look, or looking, saw the train approaching, and he undertook to pass over in front of defendant's train, they must find for the defendant.' 32. 'If the jury believe from the evidence in this case that plaintiff's intestate could have discovered the approach of defendant's train by the exercise of ordinary care, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant.' 33. 'If the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train by looking, in time to have avoided the injury, and that he failed to look, or looking saw the train approaching, and he undertook to pass over in front of the defendant's train, they must find for the defendant.' 38. 'If the jury believe from the evidence that plaintiff's intestate could have seen defendant's train approaching the crossing in time to have avoided the injury by looking, and that he omitted to look, or looking saw defendant's train approaching the crossing and near thereto, and he undertook to cross his dummy engine across in front of such approaching train of defendant, he was guilty of such negligence as will preclude a recovery in this action.' 39. 'It was the duty of plaintiff's intestate to have kept a vigilant lookout for an approaching train on defendant's track, and if the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train by the exercise of ordinary care and diligence, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant.' 40. 'It was the duty of plaintiff's intestate to know that the way across defendant's track was clear, or to look up and down defendant's track to see if a train was approaching thereon, before he attempted to cross the same with his dummy engine and train, and if the jury believe from the evidence, that by looking up and down defendant's track, he could have seen the approach of defendant's train in time to have avoided the injury, then you must find for the defendant.' Judgment for plaintiff, assessing his damages at \$10,000. Defendant appealed, assigning as error the several rulings of the trial court, to which exceptions were reserved.

HEWITT, WALKER & PORTER, for appellant.

BOWMAN & HARSH, for appellee.

Haralson, J. — In this case, on a former appeal (92 Ala, 187), it was held, under the same state of facts, that the testimony did not tend to show that the collision was wilfully caused by defendant's servants, but that the trend of the whole testimony repelled such an inference. It was also held that the second count did not charge wilful negligence. The third count charges no more than mere negligence against the defendant. The pleas were "not guilty," and contributory negligence on the part of the plaintiff's intestate. The fact that the defendant's train was not stopped, in compliance with the statute, within 100 feet of the railroad crossing, and was run in the manner and at the rate of speed charged in the third count, is negligence for which the railroad company is liable. The proof tends to establish the truth of this count, and the case has been tried, mainly, if not altogether, on the plea of contributory negligence (1). The statute regulating the duties of railroads when tracks cross each other is: "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within a hundred feet of such crossing, and not proceed until they know the way to be clear; the train on the older railroad, having the right of way, being entitled to cross first." Code, § 1145. The defendant's railroad and the Georgia Pacific track ran parallel, and fifty-six feet apart at this crossing, intersected by the Ensley Dummy Railway; and the Kansas City, Memphis & Birmingham Railway ran diagonally across both these tracks, 325 feet from the crossing of the defendant and Ensley Railway tracks, forming, with the Georgia and Pacific and Kansas City Memphis & Birmingham Railway and the Ensley Railway, an area in the shape of a triangle, with the defendant's railroad running across the open end of the triangle, fifty-six feet from, and parallel, as above stated, to the first-named railroad. This area, as the evidence tended to show, was open, with nothing to obstruct the view except a few scattering pine trees. It is 320 or 325 feet from the crossing, south, to the Kansas City, Memphis & Birmingham Railway, where it crosses the defendant's track; and, commencing a few feet south of the Kansas City, Memphis

1. In *Birmingham Mineral R. R. Co. v. Jacobs*, 92 Ala. 187, judgment for plaintiff was reversed, the court (as per opinions of *STONE*, Ch. J., and *COLMAN*, J.), discussing at length the statutory provisions as to railroads crossing each other (Code, sec. 1145), and applying the same to the defendant company in this case.

& Birmingham road, there runs a cut from five to seven and one-half feet deep. The evidence shows that, at the time the Ensley dummy approached the Georgia Pacific road, there was a freight train on the latter road, completely blocking it up, and obscuring the sight of the crossing below, and the triangular area formed by said railroads, described above. At that time the defendant's freight train, composed of fourteen cars, including the caboose, had stopped 865 feet from the Ensley crossing, and beyond the Kansas City, Memphis & Birmingham road, with its rear end, at which there was a caboose car, towards the crossing, where the accident happened. It used the signal bell, as the evidence tends to show, and backed towards the crossing; having attained a speed of from four to twelve miles an hour, as variously stated by different witnesses, at the time it reached the crossing. Just at that moment the Ensley dummy engine had reached, and was upon, the crossing; and its engine and the caboose of defendant's train collided, killing the engineer of the Ensley dummy, the plaintiff's intestate. The evidence tends to show that the train of the defendant, from the time it commenced to back towards the crossing, and until the collision occurred, never halted. It was argued that the train on the Georgia Pacific, at the time the dummy engine approached and stopped within ten or fifteen feet of it, and the deep cut referred to, in which the defendant's train had stopped, shut out the sight of the defendant's train from the dummy engine, and *vice versa*, so that their respective engineers and servants did not see each other; thereby causing them to be unmindful, each of the approach of the other. We have no evidence whether the engineer on the dummy saw the defendant's approaching train or not, further than that his engine was afterwards found to be reversed; and other persons on the dummy cars, as witnesses, swear they saw the defendant's approaching train, and the passengers got off in consequence. The conductor on the dummy swears he saw the approach of the other train when it was seventy-five feet from the crossing.

1. The plaintiff's intestate had a right to rely upon the performance, by those on the defendant's train, in charge of it, of every act imposed by law on them, when approaching the crossing. The presumption was that they should stop within 100 feet of the crossing, as the statute required them to do. It cannot be imputed as negligence to him that he did not anticipate culpable negligence on the part of the employees of defendant. One

in the position of this engineer, called upon to exercise care to avoid danger from the acts of others, might, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they would act with reasonable caution, and not with culpable negligence; and it has been held that one approaching a railroad crossing in a city is not bound to be on the alert for danger when he has the assurance — given in the failure of the company to give the statutory signals — that the crossing is safe. *Beisiegel v. N. Y. C. R. Co.*, 34 N. Y. 622; *Strong v. Sacramento & P. R. Co.*, 61 Cal. 326, 8 Am. & Eng. R. Cas. 274; *Bower v. Chicago, M. & St. L. R. Co.*, 61 Wis. 457, 19 Am. & Eng. R. Cas. 301. Without more than that the defendant's servants failed to bring their train to a stop within the distance required by law, it will be presumed the injury was caused by the negligence of defendant. *Shearman on Contrib. Neg.*, § 469; *Huckshoed v. St. Louis, etc., R. Co.*, 90 Mo. 548; *Beiseigel v. N. Y. C. R. Co.*, 34 N. Y. 622.

2. But, on the other hand, all the authorities, so far as we have seen, agree — and it certainly accords with sound principle — that it was the duty of the deceased, before he undertook to cross the track of the defendant, to look out for approaching trains, and the manner and speed with which they might come. This was his duty, notwithstanding his train had the right of way by law, and it was culpable negligence in the defendant's employees not to accord it to him, and he might presume they would not violate their legal obligation. He had no right to close his eyes to the approaching train, if he was in a position to see. In the absence of all apparent danger, the deceased would not be negligent in crossing defendant's track. He was not authorized, however, to indulge a presumption that the other company would comply with the law, in the face of facts reasonably indicating that they would not. That presumption authorized him to proceed with his train up to the danger line, which no prudent person, in the exercise of that degree of caution for his own safety, and the safety of others intrusted to him, should cross, without being chargeable with negligence. That line lay just where a person occupying his position, observing the prudence he ought to have observed, could reasonably see that the defendant's employees were not going to make the stop. The presumption which the law authorizes him to indulge — that

they would comply with the law — gave way, and no longer existed, if and when it became reasonably apparent that they did not intend to stop. The highest degree of care was upon him, just there, without reference to the carelessness of the defendant's agents. In such an emergency it is not enough that the chances are equally balanced. Nice calculations should not be made. The decided weight of probability should be against the chances of a collision. The contention on the part of appellant — that it was his duty to stop his train when it *did not* appear the other would stop, or *without knowing* it would do so, in the absence of the dangerous proximity of the other — sets aside the presumption that the law authorized him to indulge, — that the defendant would not be guilty of the culpable negligence of violating the law. It asserts the doctrine that it was his duty to presume the other would not do its duty, while the law is, he had a right to presume it would. *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 676; *Meek v. Penn. Co.*, 38 Ohio St. 682; *Belton v. Baxter*, 54 N. Y. 245; *Wendell v. N. Y. C. R. Co.*, 91 N. Y. 420; *Strong v. Sacramento & P. R. Co.*, 61 Cal. 326, 8 Am. & Eng. R. Cas. 274; *Pierce on Railroads*, pp. 343, 345-6.

3. That there was carelessness somewhere is evidenced by the fact that two trains, running, in the daytime, in nearly an open country, on two tracks, at right angles to each other, should have collided. If the deceased was negligent, we are not permitted to compare his with defendant's negligence, or to set off the one against the other, or find against the guiltiest; but the inquiry is, the defendant's guilt being admitted, was the deceased guilty of any negligence which contributed proximately to his injury?

We stated in the *S. & N. A. R. Co. v. Schaufler*, 75 Ala. 141, 2 Am. Neg. Cas. 18, that the proper inquiries were: 1. Whether the damage complained of was occasioned entirely by the negligence or wrongful act of the defendant or its servants; or, 2, whether the plaintiff, by his own negligence, or want of ordinary care and prudence, so far contributed to his own misfortune, that, but for such contributory negligence on his part, the misfortune complained of, as the basis of the action, would not have happened. 2 *Shearman & Redfield on Neg.*, § 467. These are matters for the determination of the jury, under the evidence in the case.

The court, at the instance of the defendant, gave the following charges to the jury, which stated the law as favorably for defendant

as could be: (A) "Though the law requires engineers and others running trains to stop their trains within one hundred feet of railroad crossings, yet an engineer, who sees another train approaching said crossing under such circumstances as would indicate to a reasonable man that such approaching train was not going to stop for the crossing, should not attempt to cross in front of such moving or approaching train, although he may have complied with the law in stopping for the crossing; and if he attempts to do so and is injured thereby, he would be guilty of such negligence as would preclude a recovery by him for such injury." (B) "If the jury believe from the evidence that plaintiff's intestate could have avoided the alleged injury by the exercise of extraordinary care and diligence, then plaintiff cannot recover in this action." (C) "I charge you, gentlemen of the jury, that the law required of the plaintiff's intestate the exercise of extraordinary diligence in the management and control of the dummy engine."

Applying the principles stated in this opinion to the charges requested by defendant and refused, we hold, that all of them which we do not specifically notice, were contrary to the principles we have announced above, as touching the presumption the law authorized the engineer of the dummy line to indulge, that the persons in control of the defendant's train would do their duty; and thus, plainly, or in forms more or less subtle, seek to put the responsibility on him, *if it did not appear, or he did not know* that the other train would stop, and they are subject, for the most part, to the objection of being misleading and confusing.

Numbers 25, 26, 35, 37 were passed on, on the other appeal, and are not insisted on now. Numbers 24 and 36 are general charges, on the effect of the evidence, and were properly refused. Charges 5, 6 and 7 were properly refused, since they ignore the presumption the law authorized the dummy engineer to indulge, that defendant's train would obey the law, and they were, besides, calculated to confuse and mislead. The refusal to give them is justified on these grounds. Charge 8 was bad in that it makes defendant's employees' alleged ignorance of law an excuse for its violation.

Number 12 was properly refused. If it were admitted that the engineer was not guilty of negligence, others of the employees, on whom rested duties, might have been. Besides, we must presume he knew the road, the distance between the

crossings, the length of his train, the speed it was moving, and that it was not going to stop, so far as he was concerned; and whether he was guilty of negligence or not, under these circumstances, was a question for the jury. Number 16 was calculated to mislead and confuse the jury, and the principle it asserts, if ever true, has no application to this case, and cases of this character. Number 19 was an incorrect charge, in that it ignores and altogether disregards, as a duty to be observed by the defendant train, the positive requirement of the statute, for it to come to a stop within 100 feet of the crossing of two railroad tracks.

Number 23 was calculated to confuse and mislead the jury, and took from them the consideration of the negligence, if it existed, of the other employees of the company. Besides, it does not follow, that because the negligence of the conductor was the only negligence which entitled the plaintiff to recover, that she is not entitled to recover at all. Charges 20, 21, 22, 27, 29, 30, 31, 32, 33, 38, 39 and 40 each ignored the presumption the dummy engineer was authorized to indulge, as to the other train complying with the law, in giving his train, having the older right of way, the right to cross first, and of itself coming to a full stop before attempting to cross, and in that they are each confusing and calculated to mislead, being too indefinite as to the proximity of the approaching train, its speed, and in their hypothesis of danger.

There were other assignments of error on account of the admission of evidence against defendant's objection, but they seem to be without merit, are not insisted on in argument, and are, therefore, waived.

Affirmed.

MONTGOMERY AND EUFAULA RAILWAY CO. V. CHAMBERS AND ABERCROMBIE (1).

Supreme Court, Alabama, December Term, 1885.

[Reported in 79 Ala. 338.]

COLLISION — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

— Contributory negligence is a defense, the proof of which rests on the

1. See also *Montgomery Gas Light* 86 Ala. 372, case next reported in this *Co. v. Montgomery & Eufaula R'y Co.*, volume.

defendant, and the fact that it is negatived by the averments of the complaint does not change the burden of proof and it must be affirmatively proved by the defendant, unless the plaintiff's own evidence establishes it. *Thompson v. Duncan*, 76 Ala. 334, 9 Am. Neg. Cas. 1, *followed*.

DEMURRER TO SPECIAL PLEA — ERROR WITHOUT INJURY — DEFENSE UNDER GENERAL ISSUE. — Where the court improperly sustained a demurrer to a special plea, it is error without injury, when the record affirmatively shows that the defendant had the benefit of the same defense under the general issue; but this principle does not apply to the erroneous overruling of a demurrer to a bad special plea, whereby the plaintiff is compelled to take issue on it. *Following Mudge v. Treat*, 57 Ala. 1; *Betancourt v. Eberlin*, 71 Ala. 461.

COLLISION — MOVING TRAIN AND CARS ON SIDE TRACK — CONTRIBUTORY NEGLIGENCE — SPEED OF TRAIN AND LOCATION OF CARS. — Where a railroad company brings an action to recover damages on account of injuries caused by a collision of one of its trains with empty cars left standing on a side track, caused through the negligence of the defendant's servants in leaving the empty cars too near the main track, but a collision might have been avoided by the use of reasonable diligence on the part of the persons who were in charge of the passing train, the defense of contributory negligence is made out; the speed of the train, and the fact that it had a watchman so stationed as to see and give notice of obstructions, or the want of these precautions, would be material facts. If, however, the empty cars were not placed too near the main track, but were insecurely scotched on the down grade of the side track, and were put in motion by the passing train, because of which they rolled down on it at the switch, the speed of the train would be immaterial, and contributory negligence could not be imputed to the plaintiff.

MASTER — NEGLIGENCE OF SERVANT — LIABILITY. — Where a person having exclusive possession and control of the side track of a railroad adjacent to his property for the receipt and delivery of coal, employed a third person to unload the coal delivered on a train of cars; and the cars, when unloaded, are negligently placed or left by such third person so near the main track of the road as to cause a collision with a passing train, such third party and his employer are jointly liable to the railroad company for the damages thereby caused.

CONTRIBUTORY NEGLIGENCE IN CONSTRUCTION OF TRACK — REMOTE CAUSE. — A plea of contributory negligence by plaintiff in such a case, in that "said side track was constructed by plaintiff in an unskilful and improper manner," is demurrable, because such negligence would be too remote from the injury.

APPEAL from the Circuit Court of Montgomery. *Judgment reversed.*

"Action by the Montgomery & Eufaula Railway Company, against Chambers & Abercrombie as partners, and the Montgomery Gas-Light Company, a private corporation, to recover damages on account of injuries to a train of cars belonging to plaintiff, caused by a collision with several empty cars standing

on a side-track, caused by the negligence of the defendants' servants. The defendant jointly pleaded not guilty, and a special plea averring contributory negligence; and that by an ordinance adopted by the city council of Montgomery, which was then in force, it was made unlawful for any person to cause, permit or suffer any locomotive engine to run within the limits of the city of Montgomery, at the place where said alleged injury occurred, at a greater rate of speed than four miles an hour when running backwards; and that plaintiff's said train of cars, with the locomotive engine attached thereto, was run backward at the time and place of said alleged grievance, within the limits of said city of Montgomery, at a greater rate of speed than four miles per hour; that proper and sufficient provision was made for giving signals to the engineer in charge, in case of damage; and that said train was not a regular train, running on definite and schedule time, but was drawn by what is commonly called a switch engine, running at irregular and uncertain times; and that said side-track was made by plaintiff in an unskilful and improper manner; by reason of all which said negligence of plaintiff, said alleged injury was caused, and said negligence of plaintiff contributed to cause said injury, and but for said negligence of plaintiff the alleged injury would not have occurred. The court overruled a demurrer to this special plea, and issue was then joined on it, as also on the plea of not guilty. The defendant the Montgomery Gas-Light Company also filed another special plea, alleging that the injury complained of was done by the servants of Chambers & Abercrombie, over whom it had no control; to which plea a demurrer was sustained. The bill of exceptions contains the following among other statements: 'The evidence introduced by defendants tended to show that the empty car was not at first near enough to come in contact with plaintiff's train, but that the jar of the train caused the brick, which had been placed in front of the wheels of the first car, to fall off, and that car to roll up so as to come in contact with plaintiff's train; and that the front car of the train passed without coming in contact with the cars on the side track. The evidence further tended to show that the persons employed by Chambers & Abercrombie to unload said cars had unloaded them on the side track, and pushed them back so near the main track as to cause plaintiff's train of cars to be driven against them; but there was conflict in the evidence upon said latter fact. The evidence

tended to show, also, that the plaintiff was guilty of negligence, which contributed proximately to causing said injury. The evidence further tended to show that, at the time of the injury, the plaintiff's said train of cars was backing at a greater rate of speed than four miles an hour; but the plaintiff's evidence tended to show that the speed was not greater than four miles an hour. It was admitted that there was an ordinance of the city of Montgomery, in force at that time, prohibiting the backing of plaintiff's trains at that point at a greater rate of speed than four miles an hour. The plaintiff's evidence tended to show, also, that the act of the defendants in placing said cars on said side track so near to the main track caused the plaintiff's said train of cars to be driven against the cars on the side track; and thereby to be thrown from said main track, and to be crushed and broken to pieces. Col. C. P. Ball, a witness for defendants, who had had many years of practical experience as a railroad engineer, testified that it was a very difficult thing, even for an experienced and practical railroad man, to tell with the eye the point on a side track at which a car might be placed thereon, without danger of its coming in contact with passing trains; that accidents of this kind, as a result, had been of frequent occurrence, and, in order to prevent them, it had become the custom of railroads which he had managed, and of others which he had noticed in this particular, before the occurrence of this accident, to place a clearing-post, as it is called, on the side of such side tracks at the point beyond which cars could not be placed without danger; and that this custom had been pretty general. The evidence showed, also, that no such clearing-post had been placed upon the side track in question in this case.' The court charged the jury, at the instance of the Montgomery Gas-Light Company, among other things as follows: 7. 'If the jury believe, from the evidence, that the person or persons by whose fault or negligence the injury complained of occurred, were not the servants or agents of this defendant, nor subject to its control or authority, then the plaintiff cannot recover against this defendant in this action.' To this charge the plaintiff objected. The court also gave the following charges, at the instance of Chambers & Abercrombie. 2. 'The defendants in this case are not liable for a mere mistake of judgment on the part of their employees or servants; but, before the jury can find for the plaintiff, they must find that the act of said employees, in putting the cars where

they did, was a negligent act; that is, that such employees could have discovered, by the exercise of ordinary care, that the place at which they stopped the cars was a point at which the cars running on the main track would be liable to strike them.'

3. 'Negligence consists in the failure to exercise ordinary care; and if the jury believe, from the evidence, that the mistake made by the defendants or their employees, in placing the cars near enough to the main track to be struck by the plaintiff's passing train, was such a mistake as a prudent man, exercising ordinary care, was liable to make, then it was not such negligence as makes the defendants liable for the injury done.' To each of these charges the plaintiff duly excepted. The adverse rulings of the court on the pleadings, and to the several charges given and excepted, are now assigned as error.'

ARRINGTON & GRAHAM, and WATTS & SON, for appellant.

W. S. THORINGTON, for appellees.

Stone, Ch. J.—In *Thompson v. Duncan*, 76 Ala. 334, 9 Am. Neg. Cas. 1, we held that contributory negligence is a defense, the proof of which rests on the defendant. The plaintiff need not anticipate and negative its existence. And if he aver that the injury he complains of was caused by the negligence of the defendant, without any fault or neglect of duty on his part, this does not change the burden of proof as to such contributory negligence. The defendant must still make the proof, unless plaintiff's testimony proves also that he, plaintiff, by his own negligence, has contributed proximately to the injury.

It is contended for appellees, Chambers & Abercrombie, that we need not consider the correctness of the court's ruling on the plaintiff's demurrer to their second plea; that whether their said plea was sufficient as a plea of contributory negligence, is immaterial, as that defense could be as well made under the general issue. It is not necessary we should decide this question. Code of 1876, § 2988; *Petty v. Dill*, 53 Ala. 631; *Trammell v. Hudmon*, 56 Ala. 235; *Slaughter v. Swift*, 67 Ala. 494; *Burns v. Campbell*, 71 Ala. 271, 294. The principle invoked is applied, and rightly applied, where a demurrer has been improperly sustained to a special plea that is sufficient in law, and yet the record affirmatively shows that, under the general issue, the defendant could and did obtain the benefit of the defense he sought to set up by his special plea. In such case, if there is error, it is without injury. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284. The

question is very different in such a case as this. Overruling the demurrer was a judicial determination that the plea was sufficient. Plaintiff was thereby left without discretion. He must go out of court, under the ruling on the demurrer, or he must take issue on the plea. Taking issue upon it, he stakes the fate of his case on its truth or falsity; and if the jury find the averments of the plea to be proved, the defendant is entitled to a verdict, whether the plea be good or not. *Mudge v. Treat*, 57 Ala. 1; *Betancourt v. Eberlin*, 71 Ala. 461. It results, that if the jury found the plea to be true as averred, the defendants were entitled to a verdict, and the only redress open to plaintiffs is to have a review of the ruling on the demurrer.

We will not consider the general doctrine of contributory negligence. In the recent case of *The Woodward Iron Co. v. Jones* (80 Ala. 123), at the present term, and the cases therein cited, the doctrine is so fully discussed that we deem it unnecessary to add anything to it. What we shall have to say will be confined to tendencies of the testimony in this cause. The record affirms it contains the substance of all the testimony given on the trial.

There are two important inquiries presented by this record, upon which the testimony is not agreed. The first is, the speed at which the train was moving at the time of the collision — whether at a greater rate than four miles per hour. The second inquiry is, at what point on the side track the hands engaged in unloading the cars had left the empty ones; whether so near the main track as that a passing train would strike them. This last inquiry is dependent on another. There is some testimony tending to show that the empty cars, as placed by the unloading hands, were too near the main track to allow a train to pass without striking them. Other testimony tended to show that they were not so placed, but, being put in motion by a passing train, they rolled of their own unchecked gravitation down the track — at that place a down grade — and thus collided with the passing train. All these inquiries depend on conflicting oral testimony, and are questions for the jury. If the empty cars, when the train was approaching, were so near the main track as not to allow the train to pass clear of them, then the question of the speed at which it was moving, and of its having a watchman so stationed as that he could look ahead, and see and give notice of obstructions, will become material. If this be found to be the state of the case, and if the jury shall find that moving at the rate of not

exceeding four miles an hour, and having a watchman so stationed as to see and give notice, the collision might have been averted by the use of reasonable diligence, then the railroad was guilty of contributory negligence, if the train was in fact moving at a greater rate of speed, and without such appointments, one or both. These conditions, if found to exist, will make good the defense of contributory negligence; for no action lies for an accidental injury, which could have been averted by the exercise of reasonable diligence. These are the rules for determining this case, if the empty cars were placed too near the main track to admit of free passage.

There is, however, another possible phase of the facts. There is some testimony tending to show the empty cars were placed not too near the main track, but, being insecurely fastened or scotched, the passing train put them in motion; and rolling down near the switch, the collision ensued. If these be the facts, the railroad company, it would seem, stands acquitted of proximate contributory negligence; for no amount of reasonable diligence could have foreseen or averted such catastrophe.

The question then would be, whether there was negligence in placing, fastening or scotching the empty cars. If there was, plaintiff would seem to be entitled to recover; and it is not perceived that the speed of the moving train would be a factor in this alternate aspect of the case. We may add that, according to the testimony in this cause, both the Gas-Light Company and Chambers & Abercrombie are liable for any negligence that may have been committed in placing the empty cars, if there was such negligence. Negligence of the servant, committed while performing a service within the scope of his authority, by which another is injured, renders the master liable. Wood, Mast. and Serv. 536, § 279; Shear. & Redf. on Neg., § 115.

To the second plea of defendants, Chambers & Abercrombie, there was a demurrer, which the Circuit Court overruled. The *gravamen* of the defense set up in that plea is contributory negligence. In the ninth assigned cause of demurrer is the language, "the acts alleged in said plea are not shown to have been the proximate cause of the injury complained of." The plea sets up several alleged omissions of duty by the railroad company — running backwards at a greater rate of speed than four miles an hour — no proper and sufficient provision for giving signals to the engineer in case of danger — and adds, "that said side track

was made by plaintiff in an unskilful and improper manner." This last averment is made a very important factor in the make-up of the plea, and yet it is what in law is generally a question of remote, in contradistinction to proximate, contributory negligence. *S. & N. Ala. R. Co. v. Williams*, 65 Ala. 74. The plea concludes: "By reason of all which said negligence of plaintiff, the said alleged injury was caused, and said negligence of plaintiff contributed to cause said injury; and but for said negligence of plaintiff, the alleged injury would not have occurred." In *Beach on Cont. Neg.* 7, § 3, it is said: "Contributory negligence, in its legal signification, is such an act of omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the act of defendant, is a proximate cause or occasion of the injury complained of." *Thompson v. Duncan*, 76 Ala. 334, 9 Am. Neg. Cas. 1. The demurrer to this plea ought to have been sustained.

The second and third charges given at the instance of Chambers & Abercrombie present substantially the same question, and we will consider them together. We do not doubt that, in many cases, if ordinary care be exercised, an honest mistake will be held to entail no liability on him who makes it. But charges must be interpreted in reference to the issue involved, and the testimony in the cause. In this case, the authority was to place the cars at some convenient point near the switch, so as to be accessible when it should become desirable to remove them, but not to place them so near that they would obstruct transit on the main track. All men know that a side track approaches the main track by an acute angle, until they become one at the switch. All men know that cars are broader than the iron track of the road on which they run. Hence, all men know that the cars extend beyond the rail on either side. All men must know that to allow one train or car to pass another on parallel tracks, the interval between the tracks must be double the projection of the car beyond the rail, with a margin for contingencies. The commonest knowledge cannot fail to comprehend each of these axiomatic and mathematical truths. The commonest prudence, in such service as was required here, will dictate that, if error be committed, it should be on the safe side, and would suggest the placing of a stationary car so far from the switch as to be beyond the point of possible danger. Mistakes, in such a service as the one we have in hand, constitute no answer for a claim for actual

damages. As well might a trespasser claim exemption, when he goes by mistake across an unmarked line, and cuts timber from his neighbor's freehold. See *Cooley on Torts*, 396; 2 *Whart. Ev.*, § 1028; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Jackson v. Smith*, 75 Ala. 97. These charges should not have been given.

We discover no error in the other rulings. Reversed and remanded.

MONTGOMERY GAS-LIGHT COMPANY v. MONTGOMERY AND EUFAULA RAILWAY COMPANY.

Supreme Court, Alabama, December Term, 1888.

[Reported in 86 Ala. 372.]

SEVERAL DEFENDANTS—ACTIONS *EX CONTRACTU* AND *EX DELICTO*—DISCONTINUANCE AS TO ONE OR MORE—EFFECT.—

The rule at common law that a discontinuance as to one or more of several defendants, in actions *ex contractu*, without sufficient excuse therefor, operated a discontinuance of the entire action; but, in actions *ex delicto*, the plaintiff could discontinue as to one or more of the defendants, and maintain the action against the others, even after verdict, though all had joined in the same plea, and had been found guilty of the same tort.

STATUTORY RULE.—Alabama Code, sec. 2607, which allows a discontinuance to be entered as to defendants not served with process, does not change this principle as applied to actions *ex delicto*; the plaintiff may still bring his action against several joint tort feors and dismiss as to one or more.

COLLISION OF RAILROAD TRAIN WITH CARS ON SIDE TRACK—NEGLIGENCE—SUFFICIENCY OF COMPLAINT—Where action is brought by a railroad company against its lessees of a side track, to recover damages for a collision of one of its moving trains with cars left standing on the side track, a complaint alleging that the defendant was lawfully in possession of the side track, and negligently permitted the cars to remain standing on such side track too near to the main track, whereby the collision occurred and the damage resulted, shows a substantial cause of action notwithstanding the fact that it does not negative fault or neglect on the part of the plaintiff; and this is true even where it was the plaintiff's right and duty, as to third persons, to have removed the cars as an obstruction on the track; failure to do so does not relieve the defendant of liability for its negligence.

PLEADING CONTRIBUTORY NEGLIGENCE.—In such an action a plea in bar averring contributory negligence on the part of the plaintiff in backing the train at a rate of speed faster than was allowed by a municipal ordinance, in failing to make provision for giving necessary signals to the engineer of the train, and in the construction of the side track in an improper and unskilful manner, and alleging that by reason of all which said negligence and want of ordinary care on the part of plaintiff said alleged injury was caused, and said negligence and want of ordinary care of the plaintiff proximately contributed to cause said injury, presents a substantial defense.

CHARGE TO JURY — DEFINING CONTRIBUTORY NEGLIGENCE. — In such an action a charge to the jury that, to establish the defense of contributory negligence, "they must be satisfied from the evidence that plaintiff was guilty of negligence which was proximate to, and essentially contributed to the injury," is neither erroneous nor misleading.

NEGLECT OF SERVANT — LIABILITY OF MASTER. — Where defendant having acquired by contract with plaintiff the right to the possession and use of the side track for its own purposes, employs a third person to unload its cars, and through the negligence of such third person or his servants in the performance of the work, injury is caused, the defendant will be liable therefor.

BAILEE'S RIGHT OF ACTION. — Where the cars injured by the collision were the property of another railroad company, in plaintiff's possession under a contract of bailment for hire, he had such special property in the injured car as would entitle him to maintain an action for the injury.

APPEAL from the Circuit Court of Montgomery. *Judgment reversed.*

"This case is reported in 79 Ala. 338, under the name of Montgomery & Eufaula Railway Co. *v.* Chambers & Abercrombie (1). The action was brought by the railroad company, against Chambers & Abercrombie as partners, and the Montgomery Gas-Light Company, a private corporation, to recover damages on account of injuries to a moving train of cars, caused by a collision with several empty cars which were standing on a side track, and alleged to have been left there by the negligence of the defendants, their servants and agents; and was commenced on the 17th of November, 1883. The original complaint contained but a single count, which alleged that, on the 10th of October, 1883, plaintiff was legally possessed of a railroad in the city of Montgomery, extending from the foot of Commerce street eastwardly, and constantly used in running passenger and freight cars, as the defendants well knew; that there was also in said city 'a short railroad known as a side track, or switch track, which belonged to plaintiff, and was connected with plaintiff's main track, and which was then lawfully in possession of the defendants; that on said 10th of October, 1883, plaintiff was running a train of six freight cars on said main track, yet the defendants, well knowing the premises, negligently, wrongfully and unjustly placed a freight car or cars on said side track, so near to plaintiff's said main track, and wrongfully and negligently continued the same thereon; that plaintiff's said train was then and there, without fault on the part of plaintiff, driven up and against said freight car or cars, so

1. See preceding case reported in this volume.

placed on said side track by defendants, and four of plaintiff's said cars were thereby crushed, broken to pieces, and damaged, to plaintiff's damage \$2,000.' The defendants demurred to this count, assigning the following as grounds of demurrer: 1st, because it shows that the side track belonged to plaintiff, was connected with the main track, and plaintiff had the right to control it, and it was plaintiff's right and duty to keep it free of all obstructions to passing trains; 2d, because it shows that said side track belonged to plaintiff, and was lawfully in the defendant's possession, and fails to show that defendants were not using it as plaintiff's employees, or that said cars were not placed thereon where authorized and directed by plaintiff; 3d, because it shows that defendants had a right to use said side track, equal to plaintiff's right to use its main track, and it was plaintiff's duty not to attempt to pass with its train when a collision with a car on said side track would result; 4th, because it shows that plaintiff did not use due care, and was guilty of contributory negligence; 5th, because it does not show that the defendants were guilty of any misfeasance or nonfeasance in placing said cars on the side track; 6th, because the allegation that plaintiff was without fault is a conclusion of law; 7th, because no facts are alleged which show that the act complained of was without fault on the part of plaintiff. A second count was added to the complaint by amendment, which alleged that, at the time of the injury, the side track belonged to plaintiff, and was connected with its main track, but was lawfully in the defendant's possession, and under their exclusive control, for their own uses and purposes; that it was their duty, in using cars on the side track, when not running them, so to keep them as not to obstruct the free passage of plaintiff's cars on its main track; that on said 10th of October, 1883, in violation of their said duty, defendants negligently, unlawfully and wrongfully permitted their said freight cars to remain standing on the side track, so near to the main track then in use by the plaintiff, as to obstruct the free passage of plaintiff's cars on the main track; whereby plaintiff's cars, then being run on said main track, were driven against defendant's said freight cars, without any neglect on the part of the plaintiff, and, by reason of the carelessness and gross negligence of the defendants, four of plaintiff's cars were crushed, broken to pieces, and injured to the extent of \$2,000; that plaintiff was at the time running its cars with due care, and that the collision occurred

without fault on its part. The defendants demurred to this count, also, assigning the same grounds of demurrer as to the first, and the following additional grounds: 1st, because it does not show that the plaintiff, by the exercise of ordinary care, could not have discovered the obstruction in time to have prevented the collision; 2d, because it does not show that the plaintiff did not in fact discover the alleged obstruction in time to prevent the collision; 3d, because it is not averred that the plaintiff did not discover, in time to prevent the collision, the fact that the cars on the side track were standing so near to the main track that plaintiff's cars could not safely pass them, nor is it denied that the fact could have been discovered by the exercise of ordinary care and diligence; 4th, because it is not averred or shown that, at the time of the injury, plaintiff had the proper or necessary lookout for obstructions, nor that, if a proper lookout had been kept, the obstruction would not have been discovered in time to prevent the injury. The court overruled the demurrers, and the defendants then pleaded the general issue, and a special plea, which averred, in substance, that the side track was made by plaintiff as a part of its own railway, for its own use and benefit, and was, at the time of the alleged injury, in the possession, and under the control of the plaintiff; 'that the Louisville & Nashville Railroad Company had for a long time, with plaintiff's knowledge and consent, delivered cars loaded with coal for defendants on said side track, to be then and there unloaded by defendants, and, after being unloaded, to be taken away by said L. & N. Railroad Company, for which defendants paid to said L. & N. Railroad Company one dollar for each car so delivered, and also paid plaintiff sixty cents for each car, for the use of said side track for the purpose of unloading said cars;' that said L. & N. Railroad Company had, at the time of the alleged injury, delivered on said side track three or more cars loaded with coal, to be unloaded, two of which, having been unloaded, were pushed out of the way, in order that another loaded car might be put in proper position to be unloaded, but said two unloaded cars were not pushed far enough to impede or obstruct the passage of cars on the main track; that a municipal ordinance of the city of Montgomery, in force at that time, prohibited any locomotive or train of cars, when moving backwards, to run at a greater speed than four miles per hour; that plaintiff's said engine and cars,

eighteen or more in number, were run backwards at a greater rate than four miles per hour, and no proper and sufficient provision was made for giving signals to the engineer in charge in case of danger; that said train was run by a switch engine, at irregular and uncertain times; that the side track was made by plaintiff in an unskilful and improper manner; 'by reason of all which said negligence and want of ordinary care on the part of plaintiff, said alleged injury was caused, and said negligence and want of ordinary care of plaintiff proximately contributed to cause said injury,' etc. This plea seems to have been amended after the reversal and remandment on the former appeal, but the record does not show in what particulars, nor does the judgment entry mention any amendment asked or allowed. A separate plea was also filed by the Montgomery Gas-Light Company, which, after alleging the facts as set forth in the second joint plea above mentioned, further alleged that, at the time of the alleged injury, and for some time prior thereto, 'said Chambers & Abercrombie had contracted and agreed with this defendant to do all of this defendant's unloading cars upon said side track; and said cars which caused said alleged injury were, at the time of said alleged injury, under the control and management of said Chambers & Abercrombie, or of their servants and employees, and were not under the control of this defendant, or any of its servants or employees; and this defendant had no power or authority to control or discharge said employees of Chambers & Abercrombie, who were then and there in control of said cars, and was under no agreement to pay any of said employees or servants; and this defendant did not in any manner direct the said Chambers & Abercrombie, or any of their servants or employees, to push or place said cars on said side track in the position where they were when said injury is alleged to have occurred.' The record shows no demurrer to this plea, nor any action on it. At the first term next after the reversal and remandment on the former appeal, the plaintiff seems to have entered a discontinuance of the suit as against Chambers & Abercrombie, though there is no judgment-entry stating the fact. At the June term, 1888, when the second trial was had, a motion was made by the Montgomery Gas-Light Company to dismiss the suit, on the ground that the entire action was discontinued by the discontinuance entered at the former term as to Chambers & Abercrombie, which motion the court overruled. The defendant then demurred to the complaint, as

the judgment entry recites, which demurrer was overruled, and a demurrer to the second plea being then interposed and sustained, a trial was had on issue joined, which resulted, under the charges of the court, in a verdict and judgment for the plaintiff for \$678.00 damages. On the evidence adduced, 'all of which in substance' is set out in the bill of exceptions, the court gave the following charges at the instance and request of the plaintiff:

1. 'Before the jury can find the plaintiff guilty of contributory negligence they must be satisfied from the evidence that the plaintiff was guilty of negligence which was proximate to, and essentially contributed to the injury complained of.'
2. 'The evidence must show that the plaintiff did not exercise the care of an ordinarily prudent man in running its train, before the jury can find that plaintiff was guilty of negligence.'
3. 'If the evidence shows that the cars on the switch track were under the control of the defendant, through Chambers & Abercrombie, or their employees, then it was defendant's duty to see that the cars on the side track were not placed so near the main track as to cause a collision.'
4. 'If the defendant employed Chambers & Abercrombie to unload the cars on the side track, and said Chambers & Abercrombie, or the persons employed by them, were guilty of negligence in placing or leaving the cars on the side track so as to come in collision with cars running on the main track, such negligence would be the negligence of the defendant, although said defendant did not have immediate control over the hands employed in unloading said cars.'
5. 'The plaintiff was required, in running its train which was injured by the collision with the cars on the side track, to exercise only ordinary care; and if the evidence does not show that the plaintiff was guilty of any want of ordinary care in running said train, then plaintiff was not guilty of contributory negligence.'

The defendant excepted to each of these charges as given, and also to the refusal of the following charges, which were asked in writing:

10. 'If the jury believe from the evidence that the cars alleged to have been injured were the property of the Louisville & Nashville Railroad Company, they cannot find a verdict for plaintiff for the damage done to said cars.'
12. 'If the jury believe all the evidence, they must find a verdict for the defendant.'

The charges given, the refusal of the charges asked, the rulings on demurrer, and the overruling of the motion to dismiss the suit on the ground of a discontinuance, are now assigned as error."

W. S. THORINGTON, for appellant.

WATTS & SON, for appellee.

Somerville, J. — The rule of the common law was, that in actions *ex contractu* a discontinuance as to one or more of several defendants, without sufficient legal excuse therefor, operated to discontinue the whole action. *Reynolds v. Simpkins*, 67 Ala. 378; *Mock v. Walker*, 42 Ala. 668. But, in actions *ex delicto*, the plaintiff could discontinue as to one or more defendants, and maintain his action against the remaining defendants, without discontinuing the whole suit. 5 Am. & Eng. Encyc. Law, 678; *U. S. v. Linn*, 1 How. (U. S.) 104; *Weakley v. Rogers*, 3 Watts (Pa.) 460. This could be done, even after verdict, though all the defendants had joined in the same plea, and been found guilty of the same tort; the plaintiff being permitted to enter a *nolle prosequi* as to some of them, and take judgment against the rest. *Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152; *Salmon v. Smith*, 1 Saund. 207. Section 2607 of our present Code (Code 1876, § 2911), which authorizes a discontinuance to be entered as to parties defendant who are not served, was not intended, nor does it operate, to change this common-law rule applicable to actions *ex delicto*. A plaintiff may still bring his action against several tort feasons, and dismiss as to one or more, whether served with process or not, and proceed to judgment against the remaining defendant, without discontinuing his entire action. *Slade v. Street*, 77 Ala. 576.

The dismissal of the present suit, which is one in case, or *ex delicto*, against the defendants, Chambers & Abercrombie, did not operate to discontinue the action against the other defendant, the Montgomery Gas-Light Company; and there was no error in overruling the motion of appellant to dismiss the entire action.

The principles settled in this case when last before us on appeal are, in our judgment, conclusive as to the correctness of the action of the Circuit Court in overruling the demurrers to both the original and the amended complaint. *Montgomery & E. R. Co. v. Chambers & Abercrombie*, 79 Ala. 338, 11 Am. Neg. Cas. 86, *ante*. We then decided that contributory negligence is a defense, the burden of proving which rests on the defendant, and that it is unnecessary for the plaintiff, in the first instance, to negative fault or neglect, or the want of ordinary care, on his own part. 3 Brick. Dig. 672, § 25 *et seq.*, and cases cited.

The original complaint certainly contained averments of fact

showing a substantial cause of action. It alleges, in substance, that the defendant, being lawfully in possession of the plaintiff's side track, wrongfully and negligently placed a freight car so near the main track of the plaintiff's road, that a train of cars, operated by plaintiff's servants, ran into and was driven against said obstruction on the side track, from the effects of which four of said cars were broken to pieces, and damaged to the extent of \$2,000. This was a wrongful act, or tort on the part of the defendants, constituting a violation of a legal duty, and resulting directly in pecuniary injury to the plaintiff; and hence the act complained of embraced all that was necessary to constitute a legal cause of action. It was entirely immaterial that it was plaintiff's right and duty, as to third persons, to have removed the obstruction which caused the injury. The plaintiff's liability to third persons, whether passengers or employees, cannot relieve the defendants of their liability to the plaintiff for any injury resulting from their negligence, or other wrongful conduct.

There was no error in overruling the demurrer to the complaint, either original or as amended.

We held on the former appeal, that the second plea of the defendant was defective, and that the demurrer to it should have been sustained. This plea avers several cumulative acts of alleged negligence on the part of the plaintiff, which are averred to have contributed to the injury sustained by the collision of the plaintiff's train with the car left standing on the side track. These are, 1, backing their train at a rate of speed faster than allowed by a city ordinance, which rate was four miles per hour; 2, failure to make provision for giving signals to the engineer, so as to warn him of danger while backing the train; 3, the construction of the side track, in an unskilful and improper manner. The defect in the plea, pointed out by demurrer, was, that it failed to aver that the alleged acts of contributory negligence were the proximate cause of the damages suffered, or, in other words, that they proximately contributed to the injury complained of. The amendment to the plea, which now appears in the record, obviated the grounds of objection specified in the demurrer, and the court consequently erred in sustaining the demurrer. The question of negligence *vel non* should, under the averments of the complaint, have been submitted to the jury as one of fact, under proper instructions from the court as to the law.

Contributory negligence is commonly defined as "a want of

ordinary care upon the part of the persons injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." 4 Am. & Eng. Encyc. Law, 17; 3 Brick. Dig. 672, § 25 *et seq.*, and cases cited; S. & N. A. R. Co. *v.* Schaufler, 75 Ala, 136, 2 Am. Neg. Cas. 18. It is objected that the Circuit Court, in defining the phrase *contributory negligence*, embraced in it the idea that it must have been of a character to have "*essentially* contributed" to the injury set out in the complaint. The rule is so stated in Government St. R. Co. *v.* Hanlon, 53 Ala. 70, and, in our judgment, is not incorrect. It is often said that no negligence on the part of the plaintiff, which "*remotely* contributes" to produce an injury, will debar him from a recovery; and it is variously stated that no negligence is contributory and proximate, in the order of cause and effect, unless it "*substantially*" or "*essentially*," or "*directly*" contributes to produce such injury, or is "*an efficient cause*," or "*active and efficient*" cause in producing it. These terms of description are often used indifferently to distinguish the direct and immediate or juridical cause of the injury, from a remote cause or mere condition of such injury, and they cannot be said to be either erroneous or misleading. 4 Am. & Eng. Encyc. Law, pp. 23, 25, 26, 27, 42, 51; 2 Wood's Railway Law, note, p. 1066; Beach on Cont. Neg., § 10, and pp. 27-28, 32.

If the defendant employed Chambers & Abercrombie to unload the cars on the side track, or switch, it is plain that any act of negligence on their part, or on the part of their employees, in the performance of this duty, would be imputable to the defendant, on account of the relation of master and servant existing between them, although the defendant corporation had no immediate control over such employees, while engaged in the duty of unloading. Chambers & Abercrombie were in no sense independent contractors, but were agents of the defendant, the Gas-Light Company, which itself had impliedly assumed the duty of so using the track as to keep it clear of obstructions. The law, under the terms of the contract for using the side track, thus devolved on the defendant the duty of keeping it in safe condition; and this duty could not be cast on another, so as to escape liability properly attaching to its nonperformance. City of Birmingham *v.* McCrary, 84 Ala. 469.

There was, under the above principles, no error in giving the several charges requested by the plaintiff.

It was no answer to the maintenance of the present action, that the cars alleged to have been injured belonged to the Louisville & Nashville Railroad Company. The plaintiff had them in possession as bailee for hire, and owned such a special property in the cars as to authorize an action in its name against a third person, for negligently or tortiously injuring them. Such bailee may maintain an action on the case for an injury to the bailed property, as well as an action of trespass, trover or detinue against a wrongdoer, in a proper case. The charge numbered 10, requested by the defendant, was properly refused. *Orser v. Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543, 548-550; *Hare v. Fuller*, 7 Ala. 717; *McGill v. Monette*, 37 Ala. 49; *Brewster v. Warner*, 136 Mass. 51, 49 Am. Rep. 5, 2 Am. & Eng. Encyc. Law, 61.

There was no error in refusing the general affirmative charge requested in behalf of the defendant, under the rules heretofore frequently announced by us. *City of Birmingham v. McCrary*, 84 Ala. 469; *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152.

Reversed and remanded. CLOPTON, J., not sitting.

LEAK V. GEORGIA PACIFIC RAILWAY COMPANY.

Supreme Court, Alabama, November Term, 1889.

[Reported in 90 Ala. 161].

CROSSING — CONTRIBUTORY NEGLIGENCE — PASSING IN FRONT OF APPROACHING ENGINE — FAILING TO LOOK AND LISTEN — FAILURE TO SIGNAL — WANTONNESS, RECKLESSNESS OR INTENTIONAL WRONG. — It is such contributory negligence as to defeat recovery, for a person to attempt to cross a railroad track in front of an approaching train, without looking up or down the track, unless the defense of contributory negligence is overcome by proof of such gross negligence, on the part of the persons in charge of the train, as amounts to recklessness, wantonness, or intentional wrong; the mere failure of the engineer to signal on approaching the public road crossing at which the accident occurred, does not show that degree of negligence (1).

1. *Failure to give signal* does not relieve persons of contributory negligence in crossing railway tracks. *L. & N. R. Co. v. Crawford*, 89 Ala. 240, 244; *C. R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 7 Am. Neg. Cas. 345.

APPEAL from the Circuit Court of Calhoun. *Judgment affirmed.*

“This action was brought by James D. Leak, as administrator of the estate of Charles Hawkins, deceased, to recover damages for personal injuries resulting in the death of Hawkins, who was run over and killed by a train of cars belonging to the defendant corporation. The accident occurred at a public road crossing.”

BROTHERS, WILLETT & WILLETT, for appellant.

KNOX & BOWIE, for appellee.

Stone, Ch. J. — The testimony most favorable to the plaintiff in this case shows that his intestate attempted to cross defendant's railroad track when there was an approaching train in very dangerous proximity to him, that he looked neither up nor down the track, and that if he had looked he could not have failed to see the approaching train, and thus have escaped the injury which caused his death. This, under our decisions, was negligence in him as matter of law, and not simply evidence of negligence to be passed on by the jury. *S. & N. A. R. Co. v. Thompson*, 62 Ala. 494; *Gothard v. Ala. Gr. So. R. Co.*, 67 Ala. 114; *L. & N. R. Co. v. Crawford*, 89 Ala. 240(1). In the case last cited we considered this question very fully, and need not reproduce the authorities cited in support of it. So, in the same case we defined the meaning, import, and extent of the adjectives “reckless” and “wanton,” which, under our rulings, so intensify negligence as to make it actionable, notwithstanding plaintiff may have been guilty of negligence which contributed proximately to the injury complained of. We said that “to have this effect the negligence must be so pronounced, betray such indifference to injuries likely to ensue, as to be the legal and moral equivalent of intentional wrong.” This is the only grade of negligence which precludes the defense of contributory negligence. “Less than this,” we said, “would in many conceivable cases secure to the complaining party a right of recovery, notwithstanding his own contributory negligence may have been as gross and reckless as that of defendant.” The defendant's failure, if it did fail, to sound its whistle or ring its bell, was not such reckless negligence as would overcome the plea of contributory negligence; and under no phase of the testimony was plaintiff entitled to recover. The general charge in favor of defendant was rightly given.

Affirmed.

1. See these cases, either reported in full, or cited as notes, with the Alabama cases in this volume.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY V. RICHARDS, ADM'R.

Supreme Court, Alabama, November Term, 1893.

[Reported in 100 Ala. 365.]

CROSSING — CONTRIBUTORY NEGLIGENCE. — In an action against a railroad for an injury at a crossing, where the facts, without conflict, show that the plaintiff was guilty of negligence, which proximately contributed to his injury, the question is one of law, and should be so pronounced by the court and not submitted to a jury (1).

DUTY OF PERSONS CROSSING RAILROAD TRACK. — Persons intending to cross a railroad track at a public crossing or elsewhere, where they are expressly or impliedly invited to cross, should look in every direction that the rails run, and listen for approaching trains, and on failure to perform this duty they are guilty of contributory negligence preventing recovery.

INTENTIONAL WRONG OF DEFENDANT. — Where plaintiff's negligence proximately contributed to the injury, he cannot recover unless the evidence tends to show that the defendant was guilty of misconduct or negligence so wanton or reckless as to be the equivalent of intentional wrong.

APPEAL from the Circuit Court of Cullman. *Judgment reversed.*
Action by William Richards, administrator, against the Louisville & Nashville Railroad Company to recover for the death of

1. *Contributory negligence — Stepping back on another track.* — Where a person meeting an incoming train "unconsciously" steps back on another track and is injured by a passing train, he is guilty of such contributory negligence that he cannot recover. *Chewning v. Ensley R. Co.*, 100 Ala. 493. See also *Hall v. L. & N. R. Co.*, 87 Ala. 719.

"No one is permitted to go upon or stand upon a railroad track without first looking or listening for an approaching train, and if he does so, and is injured in consequence, he is guilty of contributory negligence." *Chewning v. Ensley R. Co.*, 100 Ala. 493, 495, citing *Webb v. L. & N. R. Co.*, 90 Ala. 185; *Id.*, 97 Ala. 308. See also *Ensley R. Co. v. Chewning*, 93 Ala. 24. The *Chewning* case is reported in 11 Am. Neg. Cas. 22, *ante*.

Attempting to cross track — Looking

and listening. — A person attempting to cross a railway track at its intersection with a street or public highway without looking or listening, is guilty of contributory negligence. In *L. & N. R. Co. v. Webb*, 90 Ala. 185, 189, the court say: "In *S. & N. Ala. R. Co. v. Thompson*, 62 Ala. 494, this court said: 'It is the duty of travelers, approaching the intersection of a railroad with a public highway to look and listen for trains or engines, and a neglect of the duty, contributing to an injury, will avoid all right of a recovery for it.' In *Gothard v. A. G. S. R. Co.*, 67 Ala. 114, we quoted the following language without dissent: 'As a general rule it is culpable negligence to cross the track of a railroad at a highway crossing, without looking in every direction that the rails run to ascertain whether a train is approaching. If a party rushes into danger, which, by

plaintiff's intestate, caused by defendant's negligence. The testimony, without conflict, showed that defendant's work train was moving backwards at a speed from three to six miles per hour, the rear car of the train struck deceased, knocked him down, ran over him, and so injured him that he died. The testimony showed that there was nothing to prevent deceased from seeing the approach of the train; that he went upon the west side of the track without looking up or down the track, and while either standing on the track inattentive to the surroundings, or attempting to cross the same without looking to the right or the left he was struck. There was some conflict as to whether the whistle was blown or the bell rung, or whether a proper lookout was kept by the employees on the train.

J. M. FALKNER and GEORGE H. PARKER, for appellant.

W. T. L. COFER, for appellee.

ordinary care, he could have seen and avoided, no rule of law or justice can be invoked to compensate him for any injury he may receive. He must take care and so must the other party." See the Gothard case, reported in 11 Am. Neg. Cas. 32, *ante*. The Webb case is reported with the Alabama cases in this volume, *post*.

See Railroad Co. v. Houston, 95 U. S. 697; Continental Improvement Co. v. Stead, 95 U. S. 161; Durbin v. Oregon & Nav. Co. (Ore.), 32 Am. & Eng. R. Cas. 149; Tanner v. L. & N. R. Co., 60 Ala. 621; M. & C. R. Co. v. Copeland, 61 Ala. 376; Cook v. Cent. R. Co., 67 Ala. 533; Central R. Co. v. Letcher, 69 Ala. 106, 2 Am. Neg. Cas. 5.

In the case of Louisville & Nashville R. R. Co. v. Crawford, 89 Ala. 240, after quoting the language in S. & N. A. R. Co. v. Thompson, and Gothard v. Ala. G. S. R. Co., as given above, the court say (p. 244 *et seq.*): "In Improvement Co. v. Stead, 95 U. S. (5 Otto) 161, that court said: 'Those who are crossing a railroad track are bound to use ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their

lives are in imminent danger if collision happens; and hence it will not be pretended, without evidence, that they do not exercise proper care in a given case. But, notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them — such, namely, as an ordinary prudent man would exercise under the circumstances. Where such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortune.' In Durbin v. Oregon R. & Nav. Co., 17 Ore. 5, 32 Am. & Eng. R. Cas. 149, plaintiff had passed the crossing many times before, and was familiar with it. She had always used great care in looking for trains, but on this occasion she did not stop to look or listen. Her team came into collision with a passing engine, and she sustained considerable damage: *Held*, that the plaintiff was guilty of contributory negligence, and could not recover.' * * * We might add citations indefinitely, but consider the foregoing as sufficient.

Coleman, J.—There are some principles of law applicable to suits brought to recover damages for injuries sustained in consequence of the negligence or intentional misconduct of others, which have been repeatedly declared by this court. One of these is that where the facts without conflict show affirmatively that the plaintiff was guilty of negligence, which proximately contributed to his own injury, the conclusion is one of law, and should be so pronounced by the court, and not referred to a jury. Another familiar principle is that it is the duty of travelers or persons intending to cross a railroad track, at a public crossing or elsewhere, not being expressly or impliedly invited to cross, to look in every direction that the rails run, and to listen for approaching trains, and one who fails to perform this duty is guilty of culpable negligence. Another is that if the plaintiff was guilty of negligence which proximately contributed to his injury, he cannot recover for the injury unless the evidence

We regard the question as settled in Alabama, by our rulings cited above, that a failure to employ the senses on approaching a railway crossing, when such employment would ensure safety, is, as matter of law, contributory negligence, and a complete defense to a suit for injuries sustained by the negligent handling of the railroad, unless such negligence was so reckless and wanton, as to be in law the equivalent of wilful or intentional negligence. *Tanner v. L. & N. R. Co.*, 60 Ala. 621; *M. & C. R. Co. v. Copeland*, 61 Ala. 976; *Cook v. Cent. R. Co.*, 67 Ala. 533; *Cent. R. & B. Co. v. Letcher*, 69 Ala. 106, 2 Am. Neg. Cas. 5."

Question for the jury.—The question of the contributory negligence of a traveler injured or sustaining damages from collision at a railway crossing is one for the jury to determine. This matter is discussed and authorities cited in the case of *Louisville & Nashville R. Co. v. Webb*, 90 Ala. 185, 192 *et seq.* The court say: "That the sufficiency of evidence to establish the charge of negligence, whether causative or contributory, is generally one of fact for the jury, is a proposition which cannot and should not be ques-

tioned. *D. & M. Co. v. Steinberg*, 17 Mich. 99; *Kellogg v. N. W. R. Co.*, 26 Wis. 228; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *McGarth v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 419; *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234; *Cent. R. Co. v. Moore*, 24 N. J. L. 824; *Bonnell v. D. L. & W. R. Co.*, 39 N. J. L. 189; *Penn. R. Co. v. Ozier*, 35 Pa. St. 60; *P. & T. R. Co. v. Hogan*, 47 Pa. St. 244; *Penn. R. Co. v. Ackerman*, 47 Pa. St. 265; *Mahoney v. Met. R., Co.*, 104 Mass. 73; *French v. Taunton Branch R. Co.*, 116 Mass. 537; *Craig v. N. Y., N. H. & H. R. Co.*, 118 Mass. 431; *Kennayde v. Pac. R. Co.*, 45 Mo. 255; *Logan v. St. L., I. M. & S. R. Co.*, 92 Mo. 392; *Con. I. Co. v. Stead*, 95 U. S. (5 Otto) 161; *C. & N. E. Ill. R. Co. v. Hedges (Ind.)*, 25 Am. & Eng. R. Cas. 550; *Spencer v. Ill. Cent. R. Co.*, 29 Iowa, 55; *C., C. & C. R. Co. v. Terry*, 8 Ohio St. 570; *Directors of Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Directors of Dublin, etc., R. Co. v. Slattery*, 3 App. Cas. 1155; *Kelly's Case*, 75 Mo. 188; *Drain's Case*, 86 Mo. 574; *Stepp's Case*, 85 Mo. 279; *Penn. R. Co. v. Peters (Pa.)*, 9 Atl. Rep. 317; *B. & O. R. Co. v. Owings*, 65 Md. 502."

tends to show that the defendant was guilty of wilful misconduct or negligence so wanton or reckless as to be the equivalent of intentional wrong. We cite some of the many authorities in this State which lay down these rules: *M. & M. R. Co. v. Blakeley*, 50 Ala. 471; *Gothard v. A. G. S. R. Co.*, 67 Ala. 114; *M. & C. R. Co. v. Copeland*, 61 Ala. 376; *E. T., V. & G. R. Co. v. King*, 81 Ala. 177; *Frazer v. S. & N. A. R. Co.*, 81 Ala. 185; *Wilson v. L. & N. R. Co.*, 85 Ala. 269; *L. & N. R. Co. v. Webb*, 90 Ala. 185; *G. P. R. Co. v. Lee*, 92 Ala. 262, 11 Am. Neg. Cas. 54, *ante*; *E. T. V. & G. R. Co. v. Kornegay*, 92 Ala. 228 (in some respects similar to the case at bar); *Anniston Pipe Works v. Dickey*, 93 Ala. 418; *Warden v. L. & N. R. Co.*, 94 Ala. 277; *Nave v. A. G. S. R. Co.*, 96 Ala. 264; *L. & N. R. Co. v. Hurt*, 101 Ala. 34; *Stringer v. Ala. Min. R. Co.*, 99 Ala. 397. There is not only positive evidence to the effect that plaintiff's intestate did not look for approaching trains, but there is no fact in the present record from which a contrary conclusion could be inferred. The injury occurred about 11 o'clock A. M. The evidence shows there was no obstruction to the view, and that the train was not backing at a greater rate of speed than from three to six miles per hour, and stopped a little more than thirty feet from the place of collision. Under the undisputed evidence, the court should have instructed the jury, as matter of law, that plaintiff's intestate was guilty of contributory negligence. *Warden's Case*, 94 Ala. 277, *supra*; *L. & N. R. Co. v. Hurt*, 101 Ala. 34; *Stringer's Case*, 99 Ala. 397, *supra*.

It is equally clear from the record that defendant was not guilty of wilful wrong, or of such wanton or reckless negligence as to be the equivalent of intentional wrong. There is no evidence tending to show actual knowledge on the part of those in charge of the train of the perilous position of plaintiff's intestate, nor any facts testified to which would impute to them a consciousness of his peril. All the evidence for plaintiff on this point is that the deceased was killed at a public crossing in the town of Cullman; that the train was backing at the rate of from three to six miles per hour; that no signal bells were being sounded, and that there was no brakeman on the approaching end of the train to keep a lookout. Conceding that the jury would accept as true this phase of the evidence, it establishes but simple negligence. The proof falls far below that which is necessary to show actual knowledge of peril, or a state of facts from which a jury

would be authorized to impute knowledge to the person in charge of the train of the dangerous position of deceased at the time and place of the injury. See *Webb v. L. & N. R. Co.*, 90 Ala. 185; *Stringer's Case*, *supra* (1). The defendant was entitled to the general charge upon all the evidence. Other questions arising upon the charge of the court and rulings upon the pleadings are discussed, but we deem it unnecessary to consider them. None of them are new, and it is not probable that either will arise on another trial.

Reversed and remanded.

PANNELL, ADM'X. v. NASHVILLE, FLORENCE AND SHEFFIELD RAILROAD COMPANY.

Supreme Court, Alabama, November Term, 1892.

[Reported in 97 Ala. 298.]

CROSSING — PASSING THROUGH CUT IN TRAIN — CONTRIBUTORY NEGLIGENCE. — Where plaintiff's intestate crossed the spur track of defendant's road at the street crossing at a place where cars were left to be unloaded, leaving a space of twenty feet for the passage of the public, and on his return half an hour later, the cars having been pushed close together by an engine which decedent could have seen, was killed in attempting to pass between the cars: *Held*, he was guilty of such contributory negligence as prevented a recovery.

CONTRIBUTORY NEGLIGENCE — WANTON OR RECKLESS CONDUCT OVERCOMES DEFENSE OF. — In a case where a man in passing through a cut in a train is not killed or mortally wounded by the first impact of the cars, and warnings of his perilous condition were given by those present to the yard master in charge of the cars in time for him to signal the engineer, and in time for the latter to reverse the motion of the cars, and prevent further injury, the defendant will be held liable notwithstanding the contributory negligence of deceased.

APPEAL from Lauderdale Circuit Court. *Judgment reversed.*

Action by Mary A. Pannell, as administratrix of the estate of James Pannell, deceased, against the Nashville, Florence & Sheffield R. R. Co., for the alleged negligent killing of her intestate.

EMMETT O'NEAL and A. S. COLYAR, for appellant.

SIMPSON & JONES, for appellee.

1. The majority of the cases cited in reported in full, or as notes, with the the case at bar will be found either Alabama cases in this volume.

Stone, Ch. J. — The circuit court, at the request of defendant, gave the general charge in its favor, and the result was a verdict against the plaintiff. The propriety of this charge is the only question argued before us, and we will consider no other.

There are, in a case like this, two categories, in either of which the charge given would be free from error, and there are only two: First, when the testimony favorable to plaintiff, considered by itself, and giving it full credence, fails to show a state of facts from which it can be reasonably assumed that the defendant corporation, through its agents, was guilty of the negligence charged, and that such negligence caused the injury complained of. In such case the plaintiff fails to make out his case, and is not entitled to a verdict. The second category is this: When the testimony, taken in its entirety, shows that the defendant was guilty of negligence, which contributed proximately to the injury he suffered. And the burden of proving such contributory negligence is on the defendant. *Sav. & Mem. R. Co. v. Shearer*, 58 Ala. 672; *Wilson v. L. & N. R. Co.*, 85 Ala. 269; *C. & W. R. Co. v. Bradford*, 86 Ala. 574; *N. B. St. R. Co. v. Calderwood*, 89 Ala. 247.

The injury was inflicted in this case within the corporate limits of a city or town. It was at a public street or road crossing, in a new and thriving section of the town. The testimony shows that the crossing was very much used, particularly of mornings and evenings; and various public enterprises were being constructed and carried on in the vicinity. Several tracks and spur tracks of two railroads, running parallel with each other, crossed the street or highway within a short distance, and the particular locality was mainly utilized by the railroads for two purposes, — as a switching ground, within which to construct trains, and as spur tracks, on which loaded freight cars were placed and left to be unloaded. The injury in this case was done at a spur-track crossing. This track sprang out of the main track some distance north of the crossing, and extended south. It was used in common by two or more railroads; was frequently, if not generally, occupied by cars left there to be unloaded; and, when cars were so placed and left, the custom was to detach and separate them into sections, so as to leave an open space or way of fifteen, twenty or more feet at the highway crossing, that the public might have the unobstructed use thereof. On the day preceding the one on which plaintiff's intestate lost his life, several cars

were placed on this track, and divided into sections. South of the highway were cars loaded with lumber. Then came an open space of fifteen, twenty or more feet, leaving the highway crossing an open thoroughfare. Next came a section of three flat or gondola cars, also loaded with lumber; another interval of fifteen feet, and then a single flat car, loaded with stone. Above this last, and separated from it by a like interval, were seven cars, but whether loaded or not is not shown. These cars were all stationary, and were not in charge of or attended by any railroad employee. They so continued until the disturbance afterwards noticed. On the morning of the disaster the owners of the lumber, both north and south of the crossing, commenced unloading it from the cars. There is no proof of notice given that any movement of the cars was contemplated; nor did they learn otherwise until they felt the shock, or witnessed its effect after noticed. Plaintiff's intestate, Pannell, resided some fifty yards east of the crossing, and, before any change in the position of the cars was made, he passed on foot through the opening going west. He returned in about thirty minutes. When he returned the opening along the highway had been very materially diminished; and, in attempting to pass through, he got caught between the bumpers or draw-heads, and was crushed to death. One phase of the testimony tends to show that by one movement of the cars he was caught, but not fatally injured, until the second concussion, which killed him instantly. This is denied by defendant. Its contention is that there was but one concussion, and it claims that the nature of the injury and other circumstances prove this.

The cause of the movement of the cars, and consequent disaster: A locomotive was sent northward on the main track of the railroad, and, by means of a switch, was shifted from the main to the spur track, on which the lumber cars were being unloaded. It was north of all the cars described above as being on the spur track. The locomotive was attended by an engineer, fireman, the yard master, and one brakeman or switchman. There was no other attendant. The object was to remove or change the position of some of the cars on the spur track; but, as we have said, no notice was given of this intention to those unloading the cars. The spur track had a down grade coming south. The locomotive descended to the first or upper section of seven cars, and effected a coupling with them. There was testimony that up to this time the bell of the engine was being sounded.

There was afterwards no signal given, until after intestate was killed. The train was then moved down, and a coupling effected with the flat car on which the stone was loaded; and then a further movement was made, and the cars north of the highway, from which lumber was being unloaded, were coupled to the train. This last coupling caused the death of plaintiff's intestate. It is probable the last two couplings were made by the yard master himself. When the different sections were brought together to be coupled, there was concussion, and a movement of the cars down the track. There is difference in the testimony, and in the conclusions attempted to be drawn from it, as to the number of times the lumber cars north of the road were moved by the concussions. The contention of plaintiff was that there were three movements, the first one forcing the cars partly across the road, but leaving a space of two and one-half or three feet between the drawheads or bumpers of the two cars approaching each other; that by the second concussion they were brought near enough to each other to catch and confine the intestate, but not in contact, or so near to each other as to cause his death; and that it was the third concussion which killed Pannell. There was testimony tending to prove the truth of this version. The defendant's contention — and there was testimony tending to prove it — was that there were only two concussions which disturbed the cars next the road; that the first one thrust the car nearly across the road, bringing the drawheads so close together that intestate could at best only squeeze through; and that the second one, coming while he was attempting to pass through, being hindered by the narrowness of the opening, was the immediate cause of his death. These varying phases of the testimony call for the application of somewhat different legal principles.

We think it may be safely stated as common knowledge that it is exceedingly difficult to approach and couple to a stationary car, or section of cars, without disturbing to some extent the cars so coupled to; and, if the approach be down grade, the danger of disturbance, and the extent of it, will be increased. When a car is thus approached and coupled to, if disturbed and moved by the concussion, the movement will be from the engine, and, for all practical purposes, will present a case similar to backing a train. Such movement, if across a public highway, or in a much frequented part of a city or town, and if there be no modifying circumstances in the case, would impose the duty of having some

person so stationed as a watchman that warning might be given of impending danger. *Sav. & M. R. Co. v. Shearer*, 58 Ala. 672; *S. & N. R. Co. v. Sullivan*, 59 Ala. 272, and authorities cited in each of these cases; *S. & N. R. Co. v. Donovan*, 84 Ala. 141; *L. & N. R. Co. v. Webb*, 90 Ala. 185; *Cleveland, C., C. & I. R. Co. v. Wynant*, 100 Ind. 160, 35 Am. & Eng. R. Cas. 328, 340 *et seq.*; *Barry v. N. Y. Cent. & H. R. R. Co.*, 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615; *Roberts v. N. W. R. Co.*, 35 Wis. 679. So long as the cars on either side of the highway were left stationary, as if to be unloaded, and so long as an open space between the cars thus left was maintained at the crossing, such as was usually the case, this was an authority and invitation to the public to cross, and an implied guaranty that no risk would attend such crossing. If in these conditions the cars were suddenly moved without warning, whether that movement was intentional, or the result of concussion in coupling, and if in this way a person employed about the cars, or traveling the highway, was injured, and if such injured person had not been guilty of proximate, contributory negligence, then the railroad would be liable. If, in the case supposed, there was a failure to look or listen, this would not be contributory negligence, by reason of the assurance of safety the attendant circumstances would furnish. *Tabor v. Mo. V. R. Co.*, 46 Mo. 353; *Kennayde v. Pac. R. Co.*, 45 Id. 255; *Kelly v. M. & M. R. Co.*, 29 Minn. 1. The case we have hypothesized, however, was not this case. When plaintiff's intestate crossed the track going west, the opening at the crossing was fifteen or twenty or more feet, and the cars on either side were stationary. Everything about the crossing indicated perfect security in traveling the highway. When he returned, appearances had greatly changed. The lumber cars he had left on the north side of the crossing had been moved so as to nearly block up the highway. Only a small opening was left. This should have been a warning to him that all was not well. He should have looked and listened. *M. & C. R. Co. v. Copeland*, 61 Ala. 376; *Leak v. Ga. Pac. R. Co.*, 90 Ala. 161; *L. & N. R. Co. v. Webb*, 90 Ala. 185; *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262; *Artz v. Chic., R. I. & P. R. Co.*, 34 Iowa, 153; *Laverenz v. R. R. Co.*, 56 Iowa, 689; *N. & C. R. Co. v. Smith*, 9 Lea (Tenn.) 470; *Grippen v. N. Y. C. R. Co.*, 40 N. Y. 34; *Reading & C. R. Co. v. Ritchie*, 102 Pa. St. 435. The deceased

was clearly guilty of contributory negligence in attempting, under the circumstances, to pass through the narrow opening. Had he looked at any time after passing the main track of the L., F. & C. R. Co., save a narrow space hidden by the stack of shingles, he could not have failed to see the engine on the spur track, with steam up. *S. & N. A. R. Co. v. Thompson*, 62 Ala. 494; *L. & N. R. Co. v. Crawford*, 89 Ala. 240.

There is, however, another aspect of this question. Some witnesses testified that when Pannell was first caught between the drawheads he was not fatally injured; that this was before the last collision and coupling took place; that the yard master, who was doing the coupling, was only two car lengths from Hughes; that he (Hughes) and another hallooed to him repeatedly and loudly that he had "caught a man, and to pull up," but that the yard master paid no attention to it, and did not pull up. The cars came together, the coupling was done, and Pannell was killed. It is a well-settled principle that when one person, whether natural or artificial, is about to be the means or instrument of doing an injury to another, that other's negligence, contributing proximately to it, does not, *per se*, exonerate the actor from all further effort; does not, *per se*, relieve him or it from all responsibility for the consequences. Supine inaction, or stolid indifference to consequences, the law does not tolerate. The actor, no matter how free from fault, and no matter how negligent the one in peril may have been, must resort to every reasonable means, and employ every reasonable agency, to avert the catastrophe. There are exceptions to this rule. The impossible need not be attempted, nor should preventive effort be resorted to, at the risk of greater injury than that to be averted. We are not required to love our neighbor better than we do ourselves. *Tanner v. L. & N. R. Co.*, 60 Ala. 621; *Cook v. C. N. R. & B. Co.*, 67 Ala. 533; *E. T., Va. & Ga. R. Co. v. Deaver*, 79 Ala. 216; *Frazer v. S. & N. A. R. Co.*, 81 Ala. 185; *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262, 11 Am. Neg. Cas. 54; *Gothard v. Ala. Gr. So. R. Co.*, 67 Ala. 114, 11 Am. Neg. Cas. 32; *M. & E. R. Co. v. Stewart*, 91 Ala. 421; *Ga. Pac. R. Co. v. Hughes*, 87 Ala. 610, and authorities cited (1). If, when Pannell was first caught between the drawheads he was simply confined, and not mortally wounded, if the yard master was notified of his peril, and heard and

1. The majority of the Alabama cases cited in the case at bar will be found among the Alabama cases reported in this volume.

understood the halloo or warning, if this was heard by him in time to signal the engineer to reverse his engine, and in time to have it reversed, the down trend of the train arrested, and the collision prevented, then his failure to so signal the engineer would render the railroad liable. It would take every one of these ingredients, however, to overcome intestate's contributory negligence; and, if the jury are not affirmatively convinced of the truth of each and every one of them, their verdict should be for the defendant. We will not discuss the other questions, but think there is nothing in them. The question we have been considering was one for the jury. The Circuit Court erred in giving the general charge. *L. & N. R. Co. v. Allen*, 78 Ala. 494; 2 Wood, R'y Law, 1257; *Faber v. St. P., M. & W. R. Co.*, 29 Minn. 465; *Beach, Cont. Neg.*, § 445, and note.

Reversed and remanded.

MONTGOMERY'S EXECUTORS V. ALABAMA GREAT SOUTHERN RAILROAD COMPANY.

Supreme Court, Alabama, November Term, 1892.

[Reported in 97 Ala. 305.]

RAILWAY TRACK IN STREET — WHERE NOT PART OF PUBLIC HIGHWAY — DUTY TO TRESPASSERS. — The cross-ties of the spur track of a railway laid on the surface of an alley in a town, not imbedded in the alley, is not a public highway, and a person walking along it is a trespasser to whom the railroad company owes no duty except to avoid the infliction of wanton injury on him.

CROSSING IN FRONT OF ENGINE — CONTRIBUTORY NEGLIGENCE. — A person attempting to cross a railway track in front of a moving engine, or where stationary, so near it that there was danger of its being put in motion and striking him before he could effect a crossing, is guilty of such contributory negligence as would prevent a recovery of damages for injuries inflicted on him in such attempt. In such a case the question whether he was guilty of contributory negligence which proximately contributed to such injuries is properly submitted to the jury.

APPEAL from St. Clair Circuit Court. *Judgment affirmed.*

"In this case the complaint set forth 'that on or about the 5th day of March, 1890, the defendant, while engaged in operating its said railroad, by and through its agents and servants, and while running an engine over its road or track, or switch of its said road, at which time it was being used by defendant in the town or village of Gate City, Jefferson county, Alabama, when

at or near the railroad scale-house in said town or village, wrongfully, negligently, and carelessly ran its engine and tender connected therewith against and over the person of plaintiff's testator.' The court charged that if the deceased got on the track near an engine engaged in switching, and failed to look or watch for the approach of the engine, the plaintiff could not recover even though those in charge of the engine failed to ring the bell or keep a lookout for persons on the track; if they did not actually know of his presence on the track.'"

JOHN W. INZER, for appellants.

L. A. DOBBS, for appellee.

McClellan, J.—The complaint in this cause sufficiently alleges negligence on the part of the defendant, abstractly considered, but it avers no facts from which a duty is shown on defendant's part to exercise care and diligence with reference to plaintiff's testator, to recover damages for whose death this action is prosecuted. For aught that appears by the complaint, plaintiffs' testator might have been rightfully on the track when he was run over and killed, in which case defendant would be liable to his personal representatives for the lack of care on the part of its employees, whereby the fatal injury was inflicted; or he may have been wrongfully on the track, and hence a trespasser, in which case no mere negligence, such as is alleged, on the part of said employees, would have sufficed to fix a liability on the defendant; and on the familiar rule which requires that construction, when two or more constructions are possible, of pleadings which is most unfavorable to the pleader to be put on his averments, this complaint must be held to allege that a trespasser on defendant's track was fatally injured, through simple negligence on the part of defendant's servants. This did not sufficiently present a cause of action; and such, doubtless, would have been the ruling of the trial court had the insufficiency of the complaint been taken advantage of by demurrer. *Ensley R. Co. v. Chewning*, 93 Ala. 24. But, instead of demurring to the complaint, issue was taken upon it, the defendant thereby confessing its sufficiency, and electing to have its liability depend upon the truth or falsity of the insufficient facts averred in it. Those facts were established. It was shown without controversy that the accident occurred at a place, in a city, town, or village, where the statute requires the bell of the engine to be rung, or its whistle blown (Code, § 1144), and that this duty was

pretermitted at the time in question; and this negligence filled the averments of the complaint in that regard, which were the only averments the complaint contained by way of fixing responsibility on the defendant. Had the issue thus made up by a plea of not guilty been the only issue in the case, the plaintiffs would have been entitled to the affirmative charge upon it, notwithstanding the fact that in the abstract the issue was a wholly false and immaterial one. *Watson v. Brazeal*, 7 Ala. 451; *Masterson v. Gibson*, 56 Ala. 56; *Mudge v. Treat*, 57 Ala. 1; *Ex parte Pearce*, 80 Ala. 195; *Agnew v. Walden*, 84 Ala. 502; *Ga. Pac. R. Co. v. Propst*, 90 Ala. 1; *Crescent Brewing Co. v. Handley*, 90 Ala. 486; *Allison v. Little*, 93 Ala. 150; *Gadsden Land & Improvement Co. v. First Nat. Bank of Gadsden*, 96 Ala. 618; *McKinnon v. Lessley*, 89 Ala. 625.

But another issue was injected into the case, on the plea of contributory negligence. Inasmuch as the complaint itself, as it must be construed, showed contributory negligence on the part of plaintiff's testator, in that it showed that he was a trespasser on defendant's track, it may be that the plea was bad; but, whether so or not, no objection was taken to it, and issue was joined on it. This was, indeed, the only litigated issue on the trial below. Upon this issue of contributory negligence *vel non*, there were two aspects of the evidence. All the testimony, except that of one witness, goes to show that plaintiff's testator was in the act of walking along a spur track of the defendant company, and between the rails thereof, when he was stricken by the tender of an engine which was being slowly backed along the track in the direction in which he was going. The testimony, without any conflict, shows that this track was in an alley of the village of Gate City, and that the track was on cross ties which were laid on the surface of the alley, and not imbedded in it, so as to be a part of the roadway of the alley. It is to be presumed that the track was rightfully in the alley, nothing to the contrary appearing; and, not being incorporated with it so as to be a part of the roadway of the alley, and intended to be used as such, the case, in this respect, is on all fours with that of *Glass v. Memphis & C. R. Co.*, 94 Ala. 581. And, on this aspect of the evidence, plaintiffs' testator was a trespasser on defendant's track at the time and place of the accident, in such sort that defendant's employees owed him no duty except to avoid injuring him if possible after they became aware of his presence on the track and

consequent peril, and there being no pretense or ground for inference that they knew of his peril in time to have prevented striking and running over him, or that they knew of his presence at all, in fact, until he had been struck and run over, the court would have been justified in instructing the jury to find for the defendant if they believed this aspect of the evidence. This being so, it is unnecessary to consider the charges which were given and refused in this connection, since whether they were erroneous or not they could not have injured the appellants, they having no cause of action if this evidence was believed.

The testimony of one witness referred to above "tended to show that deceased stepped on the end of a cross-tie in rear of and near to the tender, stumbled and fell on the track, and was run over and killed by the tender." There was evidence, too, from which the jury might have inferred that when this happened, if it did so happen, the engine and tender were standing still, but began to move immediately after. It was open to inference by the jury on this evidence that deceased was in the act of *crossing* the track and was not getting on it for the purpose of proceeding along its course, when he fell; and if so he was not a trespasser. *Glass v. Memphis & Charleston R. R. Co., supra.* But though he was not a trespasser, he might well have been guilty of such contributory negligence in attempting to cross the track in front of the moving tender, if it was moving, or so near to it, conceding it to have been stationary, as that there was danger of its being put in motion and striking him before he could effect the crossing, as would be a complete defense to the action. And whether he was guilty of negligence thus proximately contributing to the result complained of was manifestly a question for the jury, and was properly submitted to their determination in the charges given.

The judgment of the Circuit Court is affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. WEBB.

Supreme Court, Alabama, November Term, 1892.

[Reported in 97 Ala. 308.]

CROSSING — UNLAWFUL SPEED — FAILURE TO SIGNAL — VIOLATION OF ORDINANCE — INJURY — INTENTIONAL WRONG. —

Running a train at a prohibited rate of speed, without warning or signals, over a public crossing may be only simple negligence, but where such train is run backward at a speed of twenty-five or thirty miles per hour without signal or warning over a street crossing much frequented by the public in a populous city, an ordinance of which prohibited trains from backing at a greater speed than four miles an hour, which circumstances are known to those in charge of the train, and injury results therefrom, it is for the jury to determine whether such conduct is the equivalent of intentional wrong (1).

STONE, Ch. J., *dissenting*.

CHARGE — UNDUE PROMINENCE TO PARTICULAR FACTS — RE-

FUSAL. — A charge giving undue prominence to certain facts and ignoring other material facts is properly refused.

APPEAL from Jefferson Circuit Court. *Judgment affirmed.*

"This action by B. T. Webb was to recover damages for personal injuries sustained by plaintiff by the alleged negligence of defendant at a street crossing. The former appeal is reported in 90 Ala. 185, where the facts are fully set forth. The court refused to give thirty-six charges requested by the defendant."

HEWITT, WALKER & PORTER, for appellant.

J. J. BANKS, and CABANISS & WEAKLEY, for appellee.

1. *Unlawful speed — Absence of statutory regulation.* — In cases not governed by statutory regulations, the rate of speed at which a train of cars may approach and pass a public road crossing is not governed by any fixed and definite rule, but is somewhat dependent upon the locality and the attendant circumstances. *E. T., V. & G. R. Co. v. Deaver*, 79 Ala. 216. In this case the court say (p. 220): "The statute does not profess to regulate the rate of speed at which a train shall be run when approaching a crossing, not in a town or city, except in one case. The engineer is required to blow the whistle or ring the bell before entering any curve crossed by a public road on a

cut, when he cannot see at least one-fourth of a mile ahead, and to approach such crossing in such cut at such moderate rate of speed as to prevent accident in the event of an obstruction at the crossing. * * * In *M. & E. R. R. Co. v. Lyon*, 62 Ala. 71, it is stated as a general rule that due care is not observed, where a train is run at such speed that it cannot be stopped within the limit at which the engineer can plainly see up a straight track an obstruction thereon, which is reasonably discoverable. In that case the obstruction was a mule, situated in a culvert, so that it could not be seen until the locomotive was within thirty yards of it, and the train could not be

Coleman, J. — The facts of the case are substantially the same as reported in 90 Ala. 185, when the case was here on a former appeal. We will not undertake to repeat them again further than may be necessary for a proper understanding of the questions to be considered on this appeal. There are no assignments of error except those based upon the refusal of the court to instruct the jury as requested by the defendant.

Most of the charges requested and refused may be considered together, and the correctness of the ruling of the court, upon them all, we think, depends upon whether there was evidence tending to show that defendant was guilty of such reckless or wanton negligence in inflicting the injury complained of, as authorized a recovery by plaintiff notwithstanding he was guilty of contributory negligence, and whether or not the ascertainment of the degree of negligence of which defendant was guilty, under the circumstances of this case, was properly referred to the jury, or was it the duty of the court to pronounce the conclusion of law as to the degree of negligence upon the facts, and as hypothesized in the several charges requested and refused? That the defendant was guilty of negligence, and plaintiff of contributory negligence, was determined by this court on the former appeal, and, so far as these questions are involved, the facts presented in

stopped in less than forty yards. It was held that the Circuit Court erred in declaring, as a matter of law, that it was negligence to run a train at a speed from which the engineer could not bring it to a standstill within the distance at which he could, under the circumstances, see the mule. Neither the statute nor the common law has undertaken to lay down any definite or fixed rule applicable to all public crossings. The current of authority is that no rate of speed, reasonably necessary to accomplish the purpose of rapid transportation of freight and passengers, and to make the usual and regular connections, amounts to negligence *per se*; due care and caution for the safety of the passengers and freight transported being observed. *Telfer v. Northern R. R. Co.*, 1 Vr. (N. J.) 188; *Maher v. A. & P. R. R. Co.* 64 Mo. 267; *Grows v. Me. Cent. R. R. Co.* 67 Me.

100; *McConkey v. C. B. & Q. R. R. Co.*, 40 Iowa, 205; *C. B. & Q. R. R. Co. v. Lee* 68 Ill. 576; *H. & St. J. R. R. Co. v. Young*, 79 Mo. 336, 19 Am. & Eng. R. Cas. 512. But the rate of speed may become negligence by the co-operation of attendant circumstances, and the locality of the crossing. What would be the observance of due care and caution on approaching and passing a public crossing in the open country, would not be such where running through the streets of a town or village, or in passing thoroughfares of frequent travel." *E. T. V. & G. R. R. Co. v. Deaver*, 79 Ala. 216, 220, 221, *citing* *R. & C. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267, *L. C. & L. R. Co. v. Goetz*, 79 Ky. 442, 14 Am. & Eng. R. Cas. 627. See also *Ensley R. Co. v. Chewing*, 93 Ala. 24, 29, 11 Am. Neg. Cas. 22, *ante*.

the present record are substantially the same, and fully sustain the correctness of the conclusion then declared. The injury was inflicted in the city of Birmingham at a crossing on Twenty-fourth street, — a public thoroughfare; and the evidence shows that residents of the city “went backwards and forwards, to a great extent, over this crossing.” By a city ordinance the speed of trains moving forward was limited to a rate of eight miles per hour, and those backing to four miles per hour, and, while moving at these rates, were required to signal their approach. The proof shows that the train in question was backing, and the evidence of the different witnesses rates its speed at from eight to twenty-five or thirty miles per hour. The evidence is in conflict as to whether any danger signals of its approach were given, as required by the statute or city ordinance. The evidence shows that other railroads had parallel lines to defendant’s, and in close proximity, upon which there were cars, and which obstructed the view of persons who were beyond these parallel lines, but to one immediately near defendant’s line the approaching train could easily have been seen for some distance before it reached the crossing. The evidence tends to show that defendant’s employees operating the train did not discover, as a matter of fact, the presence and peril of plaintiff in time to have avoided the injury by the exercise of all possible preventive effort. We believe the controlling facts of the case are fully and fairly stated. There was a city ordinance, also, which required the trains to come to a full stop before crossing Twenty-fourth street, and, when backing, not to move forward until signaled to do so by a watchman at such crossing.

The first question to be considered is whether there are any facts in evidence which show, or from which it could be legally inferred, that defendant was guilty of such reckless and wanton negligence as to authorize a recovery notwithstanding plaintiff’s contributory negligence. We have often held that if plaintiff’s peril was discovered in time to avoid the injury by the exercise of due care on the part of the defendant, and the injury was the result of the failure to perform its duty in this respect, plaintiff would be entitled to recover, although he may have been guilty of culpable negligence in the first instance. *Tanner v. L. & N. R. Co.*, 60 Ala. 621; *M. & C. R. Co. v. Womack*, 84 Ala. 149; *Frazer’s Case*, 81 Ala. 185; *Geo. Pac. R. Co. v. Lee*, 92 Ala. 262. We have held that the mere failure to ring the bell or blow

the whistle as the train approached a public crossing constitutes but simple negligence. *Ga. Pac. R. R. Co. v. Lee, supra*. A breach of duty may amount to simple negligence, or it may rise to the degree of reckless or wanton negligence, according to the place and circumstances of its commission or omission. In the case of *East Tenn., Va. & Ga. R. Co. v. Deaver*, 79 Ala. 221, it was held that "the rate of speed may become negligence by a co-operation of attendant circumstances, and the locality of the crossing. What would be the observance of due care and caution on approaching and passing a public crossing in the open country would not be such when running over the streets of a town or village, or in passing thoroughfares of frequent travel;" and this was declared to be the rule, independent of statute.

In the case of *Memphis & Charleston R. Co. v. Womack*, 84 Ala. 149, the principle was distinctly recognized that it was the duty of railroad officers to keep a lookout for persons who might be upon their tracks in cities, towns, or public crossings; and in the case of *Frazer v. S. & N. R. Co.*, 81 Ala. 195, that the duty "was commensurate with the probable occurrence of obstruction and other dangers, and arises, as to human beings, when the train is approaching a public crossing, or passing through the streets of a city, town, or village." The same rule is declared in *Ensley R. Co. v. Chewning*, 93 Ala. 29. In the case of *Ala. G. S. R. Co. v. Arnold*, 84 Ala. 168, the court uses this language: "It is a rule of law, as it is a lesson of common experience, that precautionary requirements increase in the ratio that danger becomes more threatening. It is certainly true that less vigilance is demanded at a small country depot of a single road, visited but a few times in the twenty-four hours, than is required in cities where many trains arrive and depart during each day and night." In the case of *Bentley v. Ga. Pac. R. Co.*, 86 Ala. 486, it is said that railroad "companies owe trespassers no such duty as to require a lookout for their intrusion, except at public crossings, and within the limits of cities, towns, and villages" * * * "and such trespasser cannot maintain an action for an injury received while thus trespassing, unless his presence on the track has been discovered, or peril become apparent, in time to avoid the injury, or unless such injury is caused by the wanton, reckless, or intentional negligence on the part of the company or its servants." In the case of *Highland Avenue & Belt R. Co. v. Sampson*, 91 Ala. 564, 11 Am. Neg. Cas. 48, it is

said: "In towns and densely populated cities the duty of vigilance and care on the part of those operating railroads in such places becomes proportionately increased and imperative. On the other hand, when it is known that trains follow or pass each other in rapid succession, the measure of duty required of persons crossing the railroad track at such places is proportionately increased." In the case of the *Ga. Pac. R. Co. v. Lee*, 92 Ala. 271, the distinction in the degree of vigilance required of those operating an engine and train over a public crossing of a considerably traveled highway and one in a populous district of a city is clearly recognized and strongly stated. After considering the question of negligence, which arises from an omission to give the signals of approach or the maintaining a high rate of speed over the former, and declaring such a breach of duty to be no more than simple negligence, it is held "that to run a train at a high rate of speed and without signals of approach at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers, facts known to those in charge of the train, as that they will be held to a knowledge of the probable consequences of maintaining great speed without warnings, so as to impute to them reckless indifference in respect thereto, would render their employer liable for injuries resulting therefrom notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger."

In the *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137, the rule is thus stated: "When a railroad runs its track through districts of a city, town or village, densely populated, and the demands of trade and public intercourse necessitate the frequent crossing of the track, it is the duty of those operating an engine over the track in such places to keep a lookout. This duty is not specially imposed by statute, but arises from the likelihood that in such places there are persons on the track, and the bounden duty to guard against inflicting death or injury in places and under circumstances where and when it is likely to result unless due care be observed. The duty arises when the circumstances exist which call for its exercise."

In the case of *Nave v. Ala. G. S. R. Co.*, 96 Ala. 264, the case of *Glass v. M. & C. R. Co.*, 94 Ala. 581, was explained and the

rule declared in *Ga. Pac. R. Co. v. Lee*, 92 Ala. 271, re-affirmed. See also *Ala. Gr. So. R. Co. v. Hill*, 93 Ala. 525-6.

The practice which prevails in this State authorizes the introduction of evidence of reckless, wanton or wilful negligence on the part of the defendant under a complaint which avers only simple negligence, and a recovery may be had upon such proof, although the evidence may sustain a plea of simple contributory negligence. *Chewning's Case*, 93 Ala. 30, *supra*; *Meador's Case*, 95 Ala. 137, *supra*; *Arnold's Case*, 84 Ala. 168, *supra*; *Wilkerson v. Searcy*, 76 Ala. 181; *Tanner's Case*, 60 Ala. 641, *supra*; *Womack's Case*, 84 Ala. 149, *supra*; *Frazer's Case*, 81 Ala. 185, *supra*; *Lee's Case*, 92 Ala. 262, *supra*; *Sampson's Case*, 91 Ala. 564, *supra*; *E. T. V. & G. R. Co. v. Kornegay*, 92 Ala. 230; *L. & N. R. v. Webb*, 90 Ala. 185.

In the case of *L. & N. R. Co. v. Watson*, 90 Ala. 69, the court uses this language: "But contributory negligence is not a defense, when the defendant's servants knew of the plaintiff's peril, and could have avoided the injury, notwithstanding the negligence of the plaintiff, by the use of ordinary care, or where the injury is inflicted with such gross negligence on the part of the defendant's employees as to be the legal equivalent of recklessness, wantonness or intentional wrong." And in the case of *Tanner v. L. & N. R. Co.*, 60 Ala. 641, *supra*, it was held that "either wantonness or intention on the part of the defendant will overcome the defense of contributory negligence."

In the case of *Ga. Pac. R. Co. v. O'Shields*, 90 Ala. 29, it was held that plaintiff was entitled to recover notwithstanding he was guilty of contributory negligence in that he was upon defendant's track as a trespasser, and neither listened nor looked for approaching trains. The facts showed that the collision occurred within the city limits of Anniston, where it was the duty of defendant to keep a lookout, even for trespassers, that by city ordinance trains were prohibited from running at a greater speed than six miles per hour, and that plaintiff was in plain view of defendant's operatives when five or six cars were detached from the engine and allowed to run down grade towards plaintiff. Only one brakeman was left on the detached cars to regulate the speed, and the cars were without appliances to give warning of their approach. At the time of the collision the cars had attained a speed greater than that permitted by the ordinance, in spite of the exertions of the brakeman. It was held "that there was such

gross negligence on the part of the defendant's employees as amounted to that reckless disregard of the safety of plaintiff and his property, which is the legal equivalent of intentional wrong, against which the contributory negligence of the plaintiff furnished no defense." We think the doctrine of what constituted "intentional wrong" extended too far in the O'Shields case, from which we have quoted, and that the proper rule is that declared in the Lee case, *supra*, and in this opinion. The writer of the opinion in the O'Shields case concurs in this conclusion (1).

It is clearly settled that the running of an engine and cars, over a public crossing, or within the limits of a city, in violation of the provisions of the statute of the State or city ordinance regulating their speed, and requiring signal warnings to be given at such times and places of itself amounts to simple negligence, and having regard to the principles declared in the cases cited by us, and the public safety, can it be said as a conclusion of law, that the rushing of a locomotive and train of cars, — an instrument so powerful for the destruction of life and property, — through populous districts of cities and towns, and over public crossings on crowded thoroughfares, — places where, in all likelihood, persons may be crossing, — at the rate of twenty-five or thirty miles an hour, or about thirty feet per second, without giving any signal of warning of its approach, and in violation of the statute of the State and the city ordinances, is no more, under all circumstances, than simple negligence? There was evidence which, if believed by the jury, authorized them to find the facts as here hypothesized. As was said in Arnold's case, *supra*, "precautionary requirements increase in the ratio that danger becomes more threatening;" and in Sampson's case and Meador's case, *supra*, "the duty of care and vigilance becomes proportionately increased according to the less or greater likelihood that there are persons on the track at the time and place;" and in Lee's case, *supra*, "reckless indifference will be imputed to those who run a train at a high rate of speed, without signals of approach, when trainmen have reason to believe there are persons in exposed positions, as over unguarded crossings in a populous district of a city, or where the public are wont to pass with such frequency and in such numbers, facts known to those in charge of the train," etc. The public is entitled to the right of way over public

1. The Alabama cases cited in the case at bar are reported in this volume, either in full, or as abstracts, or in notes.

crossings, — as much so as the railroad itself. Persons in the proper exercise of this right are in no sense trespassers; and while it is incumbent on them to exercise due care, by looking and listening for approaching trains, it is equally the duty of those operating trains over such places to exercise due care to prevent injury. If in utter disregard of this duty, and of the many restrictions imposed by statute and city ordinances enacted to protect life and property at such places, those in charge should rush an engine voluntarily and unnecessarily over a public crossing, when it is likely, at the time, persons are exercising their right to cross the track as a public highway, — a condition or fact, on account of its location in a populous city, and the extent of its use as such, would authorize a jury to infer, was known to defendant, — with such reckless speed that due care in keeping a proper lookout for persons who might be upon the track could not be had by those operating the train, or, if such persons should be discovered upon the track, could not possibly stop or slacken its speed in time to avoid inflicting injury, and injury did result from such negligence, can it be said, as a conclusion of law, that such reckless conduct is not the equivalent of wilfulness or wantonness? We are of opinion that a train may run, under some circumstances, over a public crossing in a populous city at such speed as to amount to that recklessness which is the equivalent of wantonness and wilfulness. The court cannot, as a matter of law, from the very character of the question, pronounce precisely and infallibly the precise rate of speed at which a train may be run over such a crossing, under the circumstances here testified to without being guilty of culpable negligence. When, therefore, it is shown that the train was run at a greater rate of speed over a public crossing, used to the extent the evidence shows the present was used, in a populous city, than is permitted by the city ordinance, and without regard to the regulation adopted by the city for the protection of persons using the crossing as a public thoroughfare, and in violation of the statutes of the State regulating the speed and signals to be given at such places, and there is evidence tending to show that the injury resulted therefrom, it is proper and necessary to submit the fact of the degree of negligence to the determination of the jury. The ruling of the court was in accord with the law as we have declared it. Charge No. 34, and others which assert a contrary rule, were properly refused.

The charges which singled out one question of disputed fact, and based a conclusion of law upon the finding of the jury as to the particular fact, were properly refused. Many of the charges are of this character. Such charges give undue prominence to the fact singled out, and ignore other material facts in the case. The jury might have found the particular facts in favor of the defendant, and yet have been satisfied, under the instruction of the court, that plaintiff was entitled to recover. The court instructed the jury unless the defendant was guilty of reckless or wanton or wilful negligence, the plaintiff could not recover; and, in coming to a conclusion, it was the duty of the jury to consider all the evidence of the case. There was no exception to the charge given by the court *ex mero motu*, and we need not further consider it. It cannot be said, as a conclusion of law, upon the facts of the case, that the complainant was guilty of wanton or reckless negligence. We find no error in the record.

Affirmed.

STONE, CH. J., dissenting.

BIRMINGHAM RAILWAY AND ELECTRIC COMPANY V. BOWERS.

Supreme Court, Alabama, November Term, 1895.

[Reported in 110 Ala. 328.]

NEGLIGENCE — "SIMPLE NEGLIGENCE." — Simple negligence, giving a cause of action, is shown where damage results from the doing or the omitting to do an act, without an intent to do wrong or to cause damage.

WANTON NEGLIGENCE — WHAT CONSTITUTES — DISTINGUISHED FROM WILFUL INJURY. — A person who, from his knowledge of existing circumstances and conditions, is conscious that his conduct will probably result in injury, with reckless indifference, or in disregard of the natural or probable consequences, but without any intent to injure, does or omits to do an act, is guilty of wanton negligence. Where there is purpose or intent to injure, and damage ensues, the injury is wilful (1).

LICENSE TO CROSS — DEAF PERSON — FAILURE TO LOOK AND LISTEN. — In an action against a railroad company to recover damages for the alleged negligent killing of plaintiff's intestate, it was shown that the deceased, who was a deaf person, attempted to cross the railroad track, by a path used by the public as a convenience in crossing, without looking for approaching trains, and that at the time of the injury the train was moving at a rapid rate of speed, in plain view from the point of the acci-

1. See note on Wilful or Wanton which the several degrees of negligence Negligence, at the end of this case, in are discussed.

dent: *Held*, that the engineer, who saw the deceased approach the track, was justified in assuming that he would not attempt to cross in front of the train, and his failure to attempt to stop the train until it was too late to prevent it from colliding with the deceased, who continued on his way, does not constitute wanton negligence or authorize a conclusion that the injury was wilfully inflicted.

CONTRIBUTORY NEGLIGENCE. — In such a case the decedent was shown to have been guilty of contributory negligence, which precludes recovery.

APPEAL from the City Court of Birmingham. *Judgment reversed.*

“Action was brought by Mary R. Bowers, the appellee, as administratrix of the estate of Thomas J. Bowers, deceased, against the Birmingham Railway & Electric Company; and the appeal is taken by the defendant from a judgment in favor of the plaintiff. The facts of the case are sufficiently stated in the opinion.”

WALKER, PORTER & WALKER, for appellant.

KERR & HALEY, for appellee.

Coleman, J. — The appellee, as administratrix, sued to recover damages for the killing of Thomas J. Bowers. The complaint charges the defendant with simple negligence, and, in different counts, with having wantonly inflicted the injury which caused the death of her intestate. The negligence averred is that the person in charge of an engine, and operating the same upon defendant's road, negligently ran the engine against the deceased while the latter was crossing the road track; and, in other counts, that he wantonly ran the engine against the deceased. To state plaintiff's case in the most favorable light that the evidence will admit of, it is as follows: The engineer was running the engine at the rate of fifteen to eighteen miles per hour, when both he and the fireman saw the deceased about ten or twelve feet from the track, as if intending to cross over it. That it was about ten o'clock in the daytime, and there was nothing to obstruct the view between the engine and the deceased. The deceased was deaf; and that, if the engineer had immediately used the proper appliances, the engine could have been stopped before reaching the point where deceased would reach the track. That the engineer made no exertion to stop the engine until it was too late. That neither he nor the fireman recognized the deceased at the time. That deceased continued forward without looking, and, as he stepped over the first rail, the engine struck him, and caused his death. That deceased was not walking

along a public crossing, but along a path used by the people in the community as a convenience. This statement gives the plaintiff every advantage. The defendant pleaded the general issue and contributory negligence. So far as plaintiff's right to recover depended upon the counts charging simple negligence, conceding that the defendant was guilty of simple negligence, the plea of contributory negligence was fully sustained; and we do not understand from appellee's argument that he insists upon the right to recover upon the counts charging simple negligence. To the counts charging wanton injury, the defendant pleaded the general issue. The material question at this time for consideration is whether the facts authorized the jury to find that the injury was wantonly or wilfully inflicted, as charged in the third and fourth counts of the complaint. Mere negligence which gives a cause of action is the doing of an act, or the omission to act, which results in damage, but without intent to do wrong or cause damage. To constitute a wilful injury, there must be design, purpose, and intent to do wrong and inflict the injury. Then there is that reckless indifference or disregard of the natural or probable consequences of doing an act, or omission of an act, designated, whether accurately or not in our decisions as "wanton negligence," to which is imputed the same degree of culpability, and held to be equivalent to wilful injury. A purpose or intent to injure are not ingredients of wanton negligence. Where these exist, if damage ensues, the injury is wilful. In wanton negligence the party doing the act, or failing to act, is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury. These are the distinctions between simple negligence, wilful injury, and that wanton negligence which is the equivalent of wilful injury, drawn and applied in our decisions. A mere error of judgment as to the result of doing an act, or the omission of an act, having no evil purpose or intent or consciousness of probable injury, may constitute simple negligence, but cannot rise to the degree of wanton negligence or wilful wrong. *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262; *L. & N. R. Co. v. Webb*, 97 Ala. 308; *Highland Ave. & Belt R. Co. v. Sampson*, 91 Ala. 560; *K. C. M. & B. R. Co. v. Crocker*, 95 Ala. 412; *L. & N. R. Co. v. Markee*, 103 Ala. 160.

What is there in the foregoing statement of facts which would justify the inference that the engineer was guilty of a wilful injury or wanton negligence? The engine was rapidly approaching the place where, apparently, deceased intended to cross the road. There was nothing to obstruct the view, and it was open daylight. It was not a stopping place for trains, nor a crossing place for the public. The engine had the right of way. It was the duty of the deceased to stop and let the engine pass. It was reasonable to expect him to do so. Can it be said that, under the circumstances, a human being would probably step upon the track in front of a rapidly approaching train in such close proximity? Do the facts authorize the inference that the engineer ought to have known that it was probable that the deceased would under all the circumstances have been guilty of such perilous and unreasonable conduct? On the other hand, was not the engineer justified in the inference that deceased would probably, if not certainly, stop, rather than be guilty of such improbable conduct? That is our conclusion, and we are of opinion the defendant was entitled to the general charge under the complaint as a whole. We consider it unnecessary to consider the other assignments of error.

Reversed and remanded.

NOTE ON DEGREES OF NEGLIGENCE.

Wilful or wanton negligence. — "The word 'recklessly' in the complaint, qualifying the act of the defendants' servants, means no more than 'negligently.'" *Kan. City, Memp. & Birm. R. Co. v. Crocker*, 95 Ala. 412. But if the servant had been charged with doing the act wantonly and wilfully, or either, the action against the master would still have been case. *Bell Tel. Co. v. Francis*, 109 Ala. 224. The several acts of negligence in this count are stated conjunctively, and on this account, if no other, the demurrer was properly overruled.

Each of the counts stated a cause of action and was not demurrable. * * * There was no pleading putting in issue wilfulness and wantonness on the part of the defendants' servants, so that question is not presented. *Highland Ave. Belt R. Co. v. Sampson*, 112 Ala. 425, 434, 11 Am. Neg. Cas. 48, *citing* *L. & N. R. Co. v. Markee*, 103 Ala. 160.

To constitute wanton or wilful negligence on the part of a railroad company or its employees, there must be a purpose or design to inflict the injury complained of, or a consciousness at the time of the act done, that such act will probably or naturally result in peril to the plaintiff; but an instruction that where the engineer failed to use all means in his power known to successful engineers, there is wanton negligence, if by the use of such means he could have avoided the injury, is erroneous. *Highland Ave. & Belt R. Co. v. Swope*, 115 Ala. 287. See *A. G. S. R. Co. v. Burgess*, 114 Ala. 587.

As to wilful or wanton negligence, see *Chewning v. Ensley R. Co.*, 100 Ala. 493, 11 Am. Neg. Cas. 22.

High rate of speed—failure to give signal—Simple and not "wanton" or "wilful" negligence.—The fact that a railroad, at a point outside of the city limits, was running its cars at the rate of fifteen miles per hour, and the servants of the railroad neglected to blow the whistle or ring the bell, or to keep a proper lookout, constitutes simple negligence, as contradistinguished from reckless or wanton negligence. *Highland Ave. & Belt R. Co. v. Maddox*, 100 Ala. 618, 620. See *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262, 11 Am. Neg. Cas. 54, *E. T. V. & G. R. Co. v. Kornegay*, 92 Ala. 228; *Ensley R. Co. v. Chewning*, 93 Ala. 24, 11 Am. Neg. Cas. 22.

But it is well settled law in Alabama, that such failure to give the cautionary signals, or to keep a proper lookout at such times and places, is negligence *per se*, entitling a person injured, who uses due care, to damages. *Ensley R. Co. v. Chewning*, 93 Ala. 24, 29, 11 Am. Neg. Cas. 22; *Ga. Pac. R. Co. v. Bluntton*, 84 Ala. 154; *S. & N. R. Co. v. Sullivan*, 59 Ala. 272.

What will overcome contributory negligence.—Failure to look and listen, to employ the senses, on approaching a railroad crossing, "when such employment would ensure safety, is, as a matter of law, contributory negligence, and a complete defense to a suit for injuries sustained by the negligent handling of the railroad, unless such negligence was so reckless and wanton, as to be in law, the equivalent of wilful or intentional." *L. & N. R. Co. v. Crawford*, 89 Ala. 240, 245, *citing Tanner v. L. & N. R. Co.*, 60 Ala. 621; *M. & C. R. Co. v. Copeland*, 61 Ala. 376, 9 Am. Neg. Cas. 31; *Cook v. Cent. R. Co.*, 67 Ala. 533; *Cent. R. Co. v. Letcher*, 69 Ala. 106, 2 Am. Neg. Cas. 5.

"It is not every degree of recklessness that will bring this doctrine into play. It must sustain a causal relation to the injury inflicted, and must raise such strong implication of reckless indifference as to supply the bad element of wilfulness or intention and abstinence from preventing activity, which, if exerted, might avert the catastrophe. This is the degree of recklessness which intensifies and magnifies negligence, until it becomes the legal and moral equivalent of wilful or intentional wrong. Less than this, if held sufficient in degree would, in many conceivable cases, secure the complaining party a right of recovery, notwithstanding his own contributory negligence may have been as gross and reckless as that of the defendant." *L. & N. R. Co. v. Crawford*, 89 Ala. 240, 245-6, *citing Tanner v. L. & N. R. Co.*, 60 Ala. 621; *Gothard v. A. G. S. R. Co.*, 67 Ala. 114, 11 Am. Neg. Cas. 32; *Frazer v. S. & N. R. Co.*, 81 Ala. 185.

The above case is *cited* and *followed* in *L. & N. R. Co. v. Webb*, 90 Ala. 185, 190; *Leak v. G. P. R. Co.*, 90 Ala. 161.

"*Gross*" or "*reckless*" negligence.—"The words 'gross,' 'reckless,' when applied to 'negligence,' *per se*, have no legal significance which import other than simple negligence or want of due care. *K. C., M. & B. R. Co. v. Crocker*, 95 Ala. 412; *L. & N. R. Co. v. Barker*, 96 Ala. 435."

Judicial division of negligence into classes by definition seems to prevail in Alabama, but such divisions are not in harmony with exact conception of the doctrine of negligence, or the current of decisions in the leading adjudications.

The term "gross negligence," is without significance. The word "gross" has been loosely employed to designate that degree of negligence which is the extreme, — which exceeds ordinary carelessness or imprudence, but the idea is scarcely compatible with exact definition, and is not in harmony with the definition given by jurists and the leading decided cases. Story, in his work on

Bailments (sec. 17), says that "gross negligence" is "the want of even slight diligence," and Sir William Jones, in his work on Bailments (p. 118), says "it is the want of such care as even the most inattentive man bestows upon his own concern."

It is said by Baron Rolfe, in the case of *Wilson v. Brett*, 11 Mees. & W. 115, 116, that the term "'gross negligence' is the same thing as 'negligence,' with the addition of a vituperative epithet." And this remark of Baron Rolfe is cited with approval by WILLIS, J., in *Grill v. Gen'l Iron Screw Colliery Co.*, 35 L. J. C. P. 330, L. R. 1 C. P. 600, affirmed 37 L. J. C. P. 235, L. R. 3 C. P. 476. Referring to these words of Baron Rolfe, Chief Justice Earl said: "I abstain from using a word to which I can attach no definite meaning, and no one, as far as I know, has ever been able to do so." (35 L. J. C. P. 324, 325.) See *McCawley v. Furness R. Co.*, 42 L. J. Q. B. 4, L. R. 8 Q. B. 57; *Smith's Leading Cases*, 223.

It is said in the case of *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 494, the United States Supreme Court "has disapproved of the attempt to fix degrees of negligence by definitions. The law furnishes no definitions which can be employed in practice, but leaves it to the jury to determine in each case what the duty is, and what omissions amount to a breach of it."

The expressions "gross negligence," "slight negligence," and "ordinary negligence," strictly speaking, are indicative of the degree or grade of care and diligence due from a party, and which he fails to give, rather than of the amount of inattention, carelessness or stupidity which he exhibits. If very great care is due, and he fails to show that care, it is called "gross negligence;" if very little care is due and he fails to come up to the mark required, it is called "slight negligence;" and if ordinary care is due, such as an ordinary man would exercise in his own affairs, failure to bestow that amount of care is called "ordinary negligence." In each case, the negligence, by whatever epithet we describe it, is simply a failure to bestow the care and skill which the circumstances demand, and hence is simply negligence. The tendency of the better considered cases is to uphold this doctrine. See *Wabash R. Co. v. McDaniels*, 107 U. S. 460, 461; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 382, 383; *Steamboat New World v. King*, 16 How. (U. S.) 474; *Griswold v. N. Y., etc., R. Co.*, 53 Conn. 590; *McPheetus v. Hannibal, etc., R. Co.*, 45 Mo. 322; *McGarth v. Hudson River R. Co.*, 32 Barb. 144; *Heathcock v. Pennington*, 11 Ired. (N. C.) L. 643; *Brown v. Lynn*, 31 Pa. St. 512; *Beal v. South Devon R. Co.*, 3 Hurl. & C. 337; *Wilson v. Brett*, 11 Mees. & W. 170.

Punitive damages. — Where "gross negligence" is shown, the jury may award punitive damages. *Ensley R. Co. v. Chewning*, 93 Ala. 24, 11 Am. Neg. Cas. 22; *A. & G. S. R. Co. v. Arnold*, 84 Ala. 159. See *Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 11 Am. Neg. Cas. 9.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. MADDRY.

Supreme Court, Arkansas, February, 1893.

[Reported in 57 Ark. 306.]

STATUTE — EVIDENCE — JUDICIAL NOTICE. — In a suit by the administratrix for the benefit of the widow and next of kin of a person who was killed by the negligent act of a railroad company, it was proved that the intestate was receiving a monthly pension from the government. The court refused to admit evidence that the widow and minor children were, upon certain conditions, entitled in their own right to receive pensions upon the intestate's death. *Held*, that the evidence was properly rejected, since the court will take notice of the Act of Congress granting such pensions, without proof. *Held*, also, that the conditional provision of the law for the benefit of the widow and minor children of the deceased pensioner should not be considered in mitigation of the damages sustained by them by reason of his death.

PASSENGER INJURED IN COLLISION — CONTRIBUTORY NEGLIGENCE — EVIDENCE. — Plaintiff's intestate had taken his seat as a passenger in a car, in the rear of the train, which had been put in place to receive passengers; and while he was seated waiting for it to proceed, another train approached from the rear at great speed. He realized the danger and attempted to escape, but was killed on the platform. Other passengers got off the car and were uninjured. One who remained in the car was not killed. *Held*, that there was no evidence to establish contributory negligence on the part of plaintiff's intestate. *Held*, also, that the fact that plaintiff's intestate was almost blind did not make him chargeable with contributory negligence in attempting to travel without an attendant, even if sight would have enabled him to escape injury; since blindness was not the juridical cause of his injury, but only a condition that made it possible, as was his presence in the car.

MINOR CHILDREN — DAMAGES FOR LOSS BY DEATH OF FATHER. —

The loss to a minor child of the physical, moral and intellectual training of his father is a proper element to be considered in estimating the damage to the child by reason of his father's death, and an instruction to that effect was correctly given.

DAMAGES. — Plaintiff's intestate, who was fifty-two years old at the time of his death, and who had been drawing a pension of seventy-two dollars per month, died leaving a widow and three children surviving him. He was of industrious habits and ordinary business capacity. His services in educating his minor children might have been found to have a pecuniary value to them. *Held*, that an award of \$7,500 as damages to his widow and children was not excessive.

APPEAL from Hot Springs Circuit Court. *Judgment affirmed.*

“Mary E. Maddry, as administratrix of the estate of her deceased husband, W. T. Maddry, brought suit against the St.

Louis, Iron Mountain & Southern Railway Company. The complaint alleged that on July 21, 1890, intestate was a passenger upon one of the local freight trains of defendant at Malvern; that, while he was in the caboose of said train, it was, by the carelessness of defendant's employees, run into by another train and wrecked; that, by reason of said collision and wreck Maddry was so badly bruised and injured that he subsequently died; that he left him surviving his widow (the plaintiff), two sons of the ages of twenty-three and sixteen, respectively, and one daughter of the age of twelve years, as his only heirs at law; that, by reason of said wrongful death the widow and next of kin were damaged in the sum of \$25,000. The answer put in issue the allegations of the complaint, and charged that Maddry's death was due to contributory negligence. Plaintiff recovered a verdict and judgment in the sum of \$7,500. Defendant has appealed."

DODGE & JOHNSON, for appellant.

SANDERS & WATKINS, for appellee.

Hemingway, J.— The appeal is put upon the following grounds, to wit:

1. That the court excluded competent evidence on part of defendant.
2. That the court erred in directions given to the jury with regard to the law of contributory negligence.
3. That the court erred in refusing prayers for instructions with regard to the law of contributory negligence; and
4. That the damage awarded by the verdict is excessive.

The grounds stated cover all questions relied upon by the appellant, and we proceed to consider them in the order set out.

1. Mrs. Maddry, the widow, was introduced as a witness for the plaintiffs, and testified that when her husband was killed, he was drawing a pension from the government of seventy-two dollars per month. The record discloses that, after she had so testified and while she was under cross-examination, the following occurred. She said:

"I am not getting a pension now, but have made application for one. Q. For what amount? A. For whatever they will give me. Q. Your pension has not yet been passed on? A. No, sir. Q. Have you made application for a pension for your children? A. No, sir, only for one, the youngest. Q. What is the amount of the pension to be granted you by the government?"

Here counsel for plaintiff objected to this question; also to all

further testimony about the widow and minor children of the deceased receiving a pension since his death. The court sustained the objection and ruled as follows:

“If the jury should find for plaintiff, they will be instructed that, in considering the damages that the widow and children might have sustained by the loss of the deceased, W. T. Maddry, they will not take into consideration any pensions that they have received from the government in consequence of the loss of the life of W. T. Maddry.”

We entertain no doubt that the court ruled correctly in excluding the proof offered. The widow had testified that she was drawing no pension, and if she was entitled to draw one the amount of it was fixed by a public act of Congress. If the right it conferred affected the issues in this case, it should have been brought to the attention of the jury by instruction from the court, and not by the testimony of a witness. If, however, the plaintiffs or any of them, were entitled to a pension which it was proper to consider in mitigation of their damages, there was error in the statement made by the court after ruling upon the admission of the testimony offered. As this action was not embraced among the grounds set out in the motion for a new trial, we would not be able, perhaps, to reverse the judgment on account of it, even if we found it to be erroneous. But we are of the opinion that there was no error in it. In estimating the amount of the pecuniary advantage that the widow and children could reasonably expect from a continuance of Maddry's life, it was proper to consider the amount of his income, including the monthly pension of seventy-two dollars, since there was a reasonable probability that he would have continued to receive it, if he had lived, and that he would have applied it, or part of it, to their use; and since they lost by his death all expectation of advantage from it. But the loss was consummate at his death, and its extent measured the plaintiff's injury, which could not be affected by the fact, either that they thereafter did or did not obtain some other valuable right, or receive an independent gratuity.

If, by the terms of the law a pension had been granted, and made payable to him for his life, and to his widow and children upon his death, it may be that the matter would not have been proper for consideration, as his death would have caused no deprivation in that respect. *Demarest v. Little*, 47 N. J. L. 28. But such is not the law. Under the law, the pension granted to

him lapsed at his death, and did not pass by limitation to plaintiffs. By the provisions of an act approved June 27, 1890, the widow, if without other means of support than her daily labor, was entitled to demand eight dollars per month for herself and two dollars per month for each of the children under sixteen years of age, to begin from the date of the application for it. See Acts U. S. Cong. of 1890, p. 182. But this right is conditional, not absolute; it is confined to the widow and children under sixteen, and the other children do not share in it; and it is a new right conferred upon the widow and young children, and not an old one passing from the deceased to them. The appellant's argument rests upon the idea that the right of the ex-soldier passes upon his death to his widow and children, and refers to section 4702 of the Revised Statutes of the United States to sustain it; but in our opinion the particular section relied upon is wholly inapplicable to this case — being applicable only where the ex-soldier dies from the wound, injury or disability on account of which the pension was granted.

No case is cited in which this precise question was involved; but our attention has been called by the appellee to a line of authorities that are relied upon as coming within the same principle, and as determining the question against the appellant. They seem to be generally approved by the courts of the different States. The rule deducible from them is that it cannot be shown in mitigation of damages that the plaintiff acquired property by descent from the deceased, or received a sum of money for insurance upon his life. 2 Sedg. on Dam., § 583, and cases cited.

And in a kindred case in Ohio, where a husband sued for the death of his wife, it was held that his recovery could not be reduced by proof that he had married a second wife who performed the services formerly performed by the first wife. *Davis v. Guarnieri*, 45 Ohio St. 470. The reason is, that a right of action arises at the time of the death to recover just what was lost by it; and that the loss thus occasioned is none the less, even though the injured party thereafter acquire, through his own skill or industry or the charity or affection of others, more than he lost.

We see nothing in the question presented to distinguish it from those rules in the cases referred to, and, upon the doctrine they establish, we hold that the conditional provision of the law for the benefit of the widow and child under sixteen was not proper to be considered in mitigation of damages.

2. It is insisted that, with regard to the law of contributory negligence, the court gave an instruction, at the prayer of plaintiffs, that was misleading, and declined to give instructions, at the prayer of defendant, that stated the law correctly. We have not looked to the instructions to determine this question, for we are of opinion that there was no evidence to which a charge upon that subject could be applicable, and that since contributory negligence is not presumed but must be proved, such an error, if committed, was without prejudice. In support of this conclusion, it is proper to state generally the case as made by uncontradicted proof. Maddry had taken his seat as a passenger in a car that had been put in place to receive passengers; it was in the rear of the train, and while he was seated waiting for it to proceed, another train approached from the rear at a great speed; he and other passengers in the car realized the danger and attempted to escape from it; some got off, while one was caught in the car; Maddry got to the platform when the car was run into and wrecked, and he was killed. The passengers who got off the car were not injured, and the one who did not get out was not killed.

These circumstances, it is contended, had sufficient tendency to establish contributory negligence, to warrant a submission of it under proper instructions to the jury. But we think they have no tendency in that direction. When it became apparent that the running train would strike the car, the danger to those who remained in it was unmistakable. Self-preservation dictated flight, and all the passengers attempted it. In the attempt Maddry was killed, while others reached places of safety, and one who was caught in the car, strangely enough, survived its wreck; but there is nothing to show that Maddry's fate was due to any careless, negligent or incautious act of his. It certainly did not appear safe, and was not incumbent upon him to keep his seat in the car about to be wrecked; and if he could have escaped, but negligently or carelessly failed to do it, the fact is not shown.

In support of the same ground the defendant relies upon the fact that Maddry was almost blind, from which it argues that he was guilty of negligence in attempting to travel without an attendant. To this it is perhaps sufficient to say that, even if sight would have enabled him to escape, blindness was not the juridical cause of his injury, but only a condition that made it possible, as was his presence in the car. *Martin v. Railway Co.*,

55 Ark. 510; *St. Louis, etc., R. Co. v. Commercial Ins. Co.*, 139 U. S. 223; *Ihl v. Railroad Co.*, 47 N. Y. 323. If he had blindly run afoul the moving train and had been injured, negligence might be imputable to him; but as his sight enabled him to enter safely the car intended for him, and he was there run down and injured by the wild train, the fact that he could not run fast enough to escape is not chargeable to his negligence — no matter whether his inability was due to the unexpected approach or unusual speed of the train, or to his blindness or other infirmity. If the law were otherwise, the child of tender years, the crippled or the infirm would travel at his own risk, and only the professional runner or athlete could claim damages for injury in being run down by a train.

3. As bearing upon the measure of damages the plaintiffs asked and the court gave the following instructions: “4. Should you find for the plaintiff, * * * you are instructed that the plaintiff is entitled to recover as damages in this cause of action such a sum of money as will be a fair and just compensation with reference to the pecuniary injuries, resulting from the death of the said Wm. T. Maddry, to the widow and children of the said deceased. 5. The jury are instructed that, in estimating the pecuniary injury, if they believe from the evidence that the widow and children of the said Wm. T. Maddry, deceased, have sustained any injury for which the defendant is liable, they have a right to take into consideration the support of the said widow and the minor children of said deceased and the damages, if any, sustained by the minor children by the loss of the instruction and physical, moral and intellectual training of the said minor children, by the deceased, and also the ages of the said minor children in determining the amount of damages.”

The defendant concedes that the first instruction states the law correctly, but strenuously contends that the second is erroneous because it authorizes the jury to consider, in estimating the damage, “the loss of instruction and physical, mental and moral training of the minor children.” This objection presents a question not settled by any decision of this court, though it has been considered frequently in the courts of other States. As a preliminary to its consideration, it may be remarked that no class of actions has received a larger share of the time of the various courts than that arising under Lord Campbell’s act and similar

acts of the different States (1). The result of the cases is the statement of a rule for the measure of damages with almost entire unanimity; and although the rule, at first glance, seems simple enough for the grasp of the commonest mind, in its application it has been found to involve unusual intricacy and difficulty.

Under Lord Campbell's act and such similar acts in different States as were not intended to enlarge the recovery it allows, it has been uniformly held that the amount recoverable was confined to a pecuniary recompense. No account is allowed of the sorrow or distress of the survivors, nor of their loss of domestic joys; such things being deemed beyond the reach of the pecuniary recompense which the law aims to afford.

The wrong for which the action is given is well defined by the Court of Appeals of New Jersey as "a deprivation of a reasonable expectation of a pecuniary advantage which would have

1. The sections in Lord Campbell's Act, 9 and 10 Vict., c. 93, relating to damages, after reciting that no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, enacts, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

By section 2, every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the

person deceased. And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death; to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

In *Pym v. Great Northern R'y Co.*, 8 Jur. (N. S.) 819, plaintiff brought action as administratrix of one Pym, who lost his life as a result of the negligence of defendant or its servants. The defendant contended that no action could be maintained, because under the act 9 and 10 Vict, c. 93, § 1, no action can be maintained unless the deceased, if living, would have maintained an action. *Held*, that this does not refer to the loss or injury sustained, but to the circumstances under which such injuries were occasioned, and provides that if deceased at the time of the injury was at fault, his administrators could not bring action. *Affirmed* in 10 Jur. (N. S.) 189. See also 2 B. & S. 759.

resulted by a continuance of the life of the deceased " (Paulmier *v.* Erie R'y Co., 34 N. J. L. 151, 158), and the statute aims to restore to the injured parties a sum of money equal to the pecuniary advantage of which they are deprived — to give the money equivalent of a pecuniary expectation lost.

In defining the wrong and stating thus generally the rule for its redress, the authorities are clear and in harmony; but when an attempt is made to deduce from them a rule for determining what particular facts are to be considered in estimating what one member of a family loses by the death of another, difficulty is encountered for which it can hardly be claimed a solution has been found. The complete failure of those who have made the attempt is illustrated in the case of a learned judge who, after charging a jury at *nisi prius* as best he could, told them that if they could devise a better rule than he had stated they were at liberty to do it; and that this is not attributable to the weakness of the particular judge is attested by the fact that the giving of such license to the jury was approved by an appellate court of unquestioned ability. Penn. R. R. Co. *v.* McCloskey, 23 Pa. St. 526. See also Penn. R. Co. *v.* Butler, 57 Pa. St. 335, 10 Am. Neg. Cas. 210.

But while it is difficult, and may be impossible, to deduce from the authorities a uniform rule for determining what should, and what should not, be considered in estimating the damage in every case, a rule is deducible that favors the consideration of the loss of the mental, moral and physical training of the parent in a suit by his child. 3 Suth., Dam. (3d ed.), § 1267; 2 Sedg., Dam., § 577; Wood's Mayne on Dam., p. 450; Tilley *v.* Hudson River R. Co., 24 N. Y. 471, 29 N. Y. 282; McIntyre *v.* N. Y. Cent. R. Co., 37 N. Y. 287, 5 Am. Neg. Cas. 97; Penn. R. Co. *v.* Goodman, 62 Pa. St. 329; Penn. R. Co. *v.* Keller, 67 Pa. St. 300; Mansfield Coal Co. *v.* McEnery, 91 Pa. St. 185; Balt. & Ohio R. Co. *v.* Wightman, 29 Gratt. 431, 10 Am. Neg. Cas. 367; Bd. of Com. *v.* Legg, 93 Ind. 523; Stohrer *v.* R'y Co., 91 Mo. 509; Searle *v.* R'y Co., 32 W. Va. 370; St. Lawrence R. Co. *v.* Lett, 11 Canada, 422; Pym *v.* G. N. R. Co., 2 B. & S. 759; Costello *v.* Landwehr, 28 Wis. 522; Ill. Cent. R. Co. *v.* Weldon, 52 Ill. 290.

It was said by counsel for defendant upon the argument that, though cases growing out of the death of the mother might be found to support the rule, none such growing out of the father's

death could be found. This is a misapprehension as to the authorities, for we have cited several cases to support it, growing out of the father's death. And, besides, it seems plain that though there may be a difference in the degree of advantage to the child growing out of the service ordinarily performed by the mother, and that by the father, there can be none in kind; and if one is deemed as of pecuniary advantage, it seems to follow that the other would be held as of the same character.

Upon the examination made by us, we find no case that antagonizes the rule stated, but we do find that in the cases that favor it there has not been entire unanimity among the judges. In the case of *St. Lawrence Co. v. Lett*, 11 Can. 422, the court approves the rule in an opinion that reviews the authorities, English and American, and sustains its conclusions by reasoning that we deem unanswerable; but in the report of the same case a dissenting opinion is found which maintains the contrary view with admirable force. We have not been able to disregard the persuasive effect of such a line of unconflicting decisions, or to discover that there is error in their conclusion. Its correctness defends upon the correctness of the following propositions: 1. That the age, observation and experience of the father fit him to assist in the physical, mental and moral training of his child; 2, that the natural affection of father for child affords a reasonable expectation that he will render the assistance that he reasonably can toward such training; and, 3, that a proper development of the physical, mental and moral qualities of the child is of pecuniary value to him, either because it must otherwise be bought or because it is an aid in money-getting in after life. It seems to us that neither of the propositions having reference to men generally, can be questioned; if not, it follows that the service of the father in training his child is of some pecuniary value, independent of what should never be considered — the happiness found in his love and companionship.

Objections raised to this conclusion, as we understand there are, not that the father's training is not a pecuniary advantage to the child, but that there are difficulties in the way of administering the rule that render it improbable that it was intended to prevail. The one most strongly urged is that there is no exact basis for estimating the value of the service lost; but this objection goes as well to the propriety of considering everything else that goes to show the value of the lost expectancy, and if it is to

control, the law would become valueless. To illustrate: proof is made that a father was able, by his industry, to earn a stated sum, and this is considered in estimating the child's damage, upon the theory that the father would have lived out the average term of life, continued to receive the same sum and to appropriate it, in part at least, to those suing. The theory is destitute of an element of certainty, and is a compound of more or less remote probabilities. The father might not live the average term of life, or, if he did, might cease to earn money; and the child might die during his father's life, or, if he lived, might cease to receive aid from him, and be compelled to support him; or, if both should live out their expectancy, and the father continue to receive money and to apply it in part to the child, the number of persons interested in the father's life might increase, and the share of the child correspondingly diminish. In no event is it possible to determine with certainty that any pecuniary benefit would have continued to the child, or, if it did, what it would have amounted to if the father's life had continued, and all that can be attempted is to make an estimate upon disclosed probabilities. Upon the same basis an estimate can be made of the money value of the father's probable service and care in educating and training the child, for it is no less susceptible of precise calculation than the extent or value of future receipts of property. Another objection is that the rule makes it to the interest of the defendant to show that the father was disqualified to train his child, and that it thereby instigates an unseemly and improper inquiry into the character of the dead; but this objection applies as well to considering his probable earnings. For it is equally as competent and important, in the latter case as in the former, for the defendant to rebut the probable expectancy of receiving money from the father by showing that he was idle, dissipated or thriftless, and would probably have earned nothing, or that he was undutiful and would not have shared his earnings with his child.

The Legislature must have known that the subject-matter of the act did not admit of precision, and that the wrongs it sought to remedy could not be accurately measured; it must have known also that, in awarding to the living their rights under the law, it might become material to expose the ignorance, immorality, idleness, thriftlessness or undutifulness of the dead; and as the law was passed in face of the difficulty and disagreeableness of administering it, it becomes the duty of the courts to attempt to administer it in accordance with its letter and intent.

It is further said that there was no evidence on which to base the charge, and if full and satisfactory proof were required, we should be constrained to say there was none. But Maddry had been a postmaster, a school director, and a promoter of schools, and there was evidence tending to show that he was industrious in his habits and enjoyed the respect of those who knew him, and that he was an affectionate and dutiful father, who tried to rear and educate his children properly; and upon proof of such facts, even if they are not presumed, the plaintiffs were entitled to the instruction.

It is argued in the last place that the verdict is excessive. What has been said already may be recurred to as illustrative of the great difficulty of fixing the amount recoverable. From the nature of the wrong to be redressed, it follows that the damage cannot be assessed with anything like mathematical precision. It has been said that the damage cannot be "calculated," but must be "estimated." Even this term implies a degree of precision of which the matter is hardly susceptible. As the right to make the estimate rests with the jury, whose finding is conclusive unless error is manifest, it follows that it must have great latitude, and that we cannot set aside a verdict as excessive unless it clearly exceeds the sum of probable pecuniary benefits.

The proof in this case showed that Maddry drew a pension of seventy-two dollars per month for a total disability received during the war of the rebellion, and it does not appear unreasonable, in view of the course of the government in such matters, to assume that he would have continued to receive it during his life; it was perhaps probable that he would have appropriated of the sum so received as much as six hundred dollars per annum to the use of his family; he was fifty-two years of age, and there was a reasonable probability that he would live out the average term of life. Upon these facts, and for the reasons indicated, the jury would have been justified in awarding a sum that would purchase an annuity of \$600 for the number of years that he might be expected to live — which, according to tables in common use and treating money as worth eight per cent. per annum, would amount to \$5,208. In addition to the fact just referred to, Maddry seems to have been industrious and energetic, and to have sought and obtained work at times, and this furnished another ground for the expectancy of advantage from his life; he seems to have possessed at least ordinary capacity for business

for one in his condition in life, and the service he might be expected to render in taking care of his home furnished still another ground of expectancy. Then his service of educating his children might have been found to have a pecuniary value, and the estimate to be placed upon the several matters referred to would have justified a finding in excess of the sum awarded on account of the pension. In view of them all, it is not so manifest that the value of the plaintiff's reasonable expectancy was less than \$7,500, that we feel warranted in disturbing the jury's finding for that sum.

This is certainly a border case, and we are convinced the jury went very near the limit upon its power. It may be that this case illustrates the evil to be apprehended in administering the law; but if this is true, it is inherent in the law, and can be remedied only by the power that made the law.

We have given to the consideration of this case much time and the most careful deliberation, seriously apprehending that it exacted too much of the defendant; but our conclusion is that there is no error for which we can reverse the judgment.

The plaintiffs ask that we exercise the discretion, which the law confers upon us, to impose a penalty for the prosecution of this appeal as being unnecessary and for delay; our opinion is that the case does not call for the exercise of this discretion.

Judgment affirmed.

LITTLE ROCK AND MEMPHIS RAILWAY CO. AND THE LITTLE ROCK AND ARGENTA STREET RAILWAY CO. v. HARRELL.

Supreme Court, Arkansas, February Term, 1894.

[Reported in 58 Ark. 454.]

COLLISION BETWEEN RAILROAD AND STREET CAR — PREVIOUS ACTS OF NEGLIGENCE — EVIDENCE. — In an action to recover damages for negligently killing a passenger on a street railway by a collision between the street railway and a railway locomotive, evidence of former acts of negligence on the part of the driver of the street car at the place where the accident occurred is not admissible where the only question is that of negligence or non-negligence on the part of the person on the particular occasion.

NEGLIGENCE OF EMPLOYEE OF STREET CAR — DUTY OF RAILWAY COMPANY. — In such a case a charge to the jury which instructs them that when the employees of the railroad company discovered the street car

without a driver, or with a driver who was negligent in his duty, approaching and near the track, and in danger of the railroad train, if they could have stopped the railroad train and avoided the collision, but failed to do so, the railroad company is liable, is correct, because such was but ordinary and reasonable care under the circumstances.

DOCTRINE OF IMPUTED NEGLIGENCE DISAPPROVED — The doctrine that in such an action where the street railway company on whose car the injured person was a passenger was guilty of negligence, such negligence is imputed to the injured passenger, and he cannot recover against the railroad company for the injuries resulting from the collision, disapproved. *Thorogood v. Bryan*, 8 C. B. 115, *denied* (1); *Duggins v. Watson*, 15 Ark. 118, *distinguished*.

1. *Doctrine of Thorogood v. Bryan discussed*. — In *Thorogood v. Bryan*, 8 C. B. 115, 65 Eng. C. L. 115, decided June 20, 1849, it is held that where a person in an omnibus or steam vessel is damaged by the negligent management of another omnibus or steam vessel, he cannot recover if there has been negligence on the part of those having the care of the omnibus or steam vessel in which he is carried.

The decision in *Thorogood v. Bryan*, has been much discussed in England and extensively followed in America. The doctrine of that case was questioned in *Waite v. North Eastern R. Co.*, 1 E. & B. 724, decided in 1860, was not followed in *The Miller*, 1 Lush. 388, decided in 1861, was approved in *Armstrong v. Lancashire & York R. Co.*, L. R. 10 Exch. 47, decided in 1875, followed in *The Bernina*, L. R. 11 Prob. Div. 31, decided in 1886, but this latter case was taken to the Court of Appeals, and there the doctrine of *Thorogood v. Bryan*, approved in *Armstrong v. Lanc. & York R. Co.*, was denied and those cases overruled. *The Bernina*, L. R. 12 Prob. Div. 58 (1887). In this latter case the facts were substantially the same as those in the case of *Thorogood v. Bryan*. A collision having occurred through the fault of two vessels, two persons on board of one of them, an engineer and a passenger, who had nothing to do with the navigation of the vessel, were drowned. The Court of Appeals *held*,

after a thorough review and analysis of the cases, that the deceased engineer and passenger were not to be deemed to be identified with those in charge of the vessel on board of which they were, so as to debar their personal representatives from maintaining an action for negligence against the owner of the other vessel. This decision was *affirmed* by the House of Lords, L. R. 13 App. Cas. 1 (1888).

The doctrine of *Thorogood v. Bryan* was repudiated in *Chartered Mercantile Bank v. Netherlands, etc.*, Nav. Co., 8 Q. B. Div. 118, and on appeal, 10 Q. B. Div. 521, 545.

Mr. Justice Elliott says in *Miller v. Louis. & Nash. R. Co.*, 128 Ind. 97, that "the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, has never been sanctioned by this court. *Pitts., C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Town of Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Knightstown v. Musgrove*, 116 Ind. 121; *Michigan City v. Boeckling*, 122 Ind. 39. The doctrine has, indeed, been overthrown in England, and is repudiated by almost all the courts of this country. See authorities cited in notes on page. 630-632, Elliott, Roads and Streets."

Speaking of the case of *Thorogood v. Bryan*, Mr. Chief Justice Beasley, in *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225, 227, says: "This case stands, I think, in point of principle, alone in the line of English decisions, and the grounds upon which it rests

PRESUMPTION OF NEGLIGENCE FROM COLLISION. — The fact of collision raises a presumption of negligence on the part of the street railway

seems to me inconsistent with familiar rules." Other eminent American judges have taken the same view of the case, and the doctrine may be said to be now exploded in this country as well as in England.

See *Elyton Land Co. v. Mingea*, 89 Ala. 521; *Ga. Pac. R. Co. v. Hughes*, 87 Ala. 610; *Otis v. Thom*, 23 Ala. 469; *Tompkins v. Clay St. R. Co.*, 66 Cal. 163; *Hillman v. Newington*, 57 Cal. 56; *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601; *East Tenn., V. & G. R. Co. v. Markens*, 88 Ga. 60; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; *Carmi v. Ervin*, 59 Ill. App. 555; *Louis. N. A. & C. R. Co. v. Creek*, 130 Ind. 139; *Miller v. Louis. & N. R. Co.*, 128 Ind. 97; *Knightstown v. Musgrove*, 116 Ind. 121; *Brannan v. Kokomo, G. & J. G. R. Co.*, 115 Ind. 115; *Pitts., C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Town of Albion v. Hetrick*, 90 Ind. 545; *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 640; *Larkin v. Burl., C. R. & N. R. Co.*, 85 Iowa, 492; *Nesbit v. Garner*, 75 Iowa, 314; *Leavenworth v. Hatch*, 57 Kan. 57; *Cahill v. Cin., N. O., etc., R. Co.*, 92 Ky. 345; *Louis., C. & L. R. Co. v. Case*, 72 Ky. (9 Bush) 728; *Danville, L. & N. Tr. R. Co. v. Stewart*, 59 Ky. (2 Metc.) 119; *State v. Boston & Me. R. Co.*, 80 Me. 430; *Phila., W. & B. R. Co. v. Hogeland*, 66 Md. 149; *Randolph v. O'Riordan*, 155 Mass. 331; *Poor v. Sears*, 154 Mass. 539; *Malmsten v. Marquette, H. & O. R. Co.*, 49 Mich. 94; *Cuddy v. Horn*, 46 Mich. 596; *Flaherty v. Minn. & St. L. R. Co.*, 39 Minn. 328; *Follman v. Mankato*, 35 Minn. 522; *Griggs v. Fleckenstein*, 14 Minn. 81; *McMahon v. Davidson*, 12 Minn. 357; *Ala. & V. R. Co. v. Davis*, 63 Miss. 444; *Dickson v. Mo. Pac. R. Co.*, 104 Mo. 491; *Becke v. Mo. Pac. R. Co.*, 102 Mo. 544; *Kuttner v. Lindell R. Co.*, 29 Mo. App. 502;

Noyes v. Boscawen, 64 N. H. 361; *N. Y. L. E. & W. R. Co. v. Steinbrenher*, 47 N. J. L. 161; *Bennett v. N. J., etc., R. Co.*, 36 N. J. L. 225; *Phillips v. N. Y. Cent. & H. R. R. Co.*, 127 N. Y. 657; *Seaman v. Koehler*, 122 N. Y. 646; *Masterson v. N. Y. Cent. & H. R. R. Co.*, 84 N. Y. 247; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Robinson v. N. Y. Cent. R. Co.*, 66 N. Y. 11; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Sheridan v. Brooklyn R. Co.*, 36 N. Y. 39; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Strauss v. Newburgh R. Co.*, 6 App. Div. (N. Y.) 264; *Ouversen v. Grafton*, 5 N. D. 281; *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; *Bunting v. Hogsett*, 139 Pa. St. 363, *overruling* previous decisions in which *Thorogood v. Bryan* had been followed; *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544; *Markham v. Houston Direct Nav. Co.*, 73 Tex. 247; *Galv., H. & S. S. R. Co. v. Kutac*, 72 Tex. 643; *Johnson v. Gulf, C. & S. F. R. Co.*, 2 Tex. Civ. App. 139; *N. Y., P. & N. R. Co. v. Cooper*, 85 Va. 939; *Little v. Hackett*, 116 U. S. 366; *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172, *affirmed* 51 Fed. Rep. 174, 4 U. S. App. 542.

See also *Lucas v. New Bedford & Taunton R. R. Co.*, 72 Mass. 64, 3 Am. Neg. Cas. 735, 741; *Honey v. Chicago, B. & Q. R. Co.*, 59 Fed. Rep. 423, 7 Am. Neg. Cas. 556, 560; *Bartram v. Town of Sharon (Conn. 1899)*, 6 Am. Neg. Rep. 10, where the case of *Thorogood v. Bryan* is discussed in a note, showing the American authorities where the doctrine in that case is expressly repudiated.

See note on the Doctrine of Imputed Negligence at the end of this case.

company on which the injured person was a passenger, but no such presumption arises as against the railroad company (1).

DUTY OF DRIVER OF STREET CAR. — It is the duty of the driver of a street car to keep a lookout for railroad trains crossing his track.

NEGLIGENCE OF TRAINMEN. — The failure of a street-car driver to keep a proper lookout for railroad trains crossing his track will not exonerate the railroad company even though the employees did everything in their power to prevent the accident after they discovered the street car, where such employees have been guilty of negligence before seeing the street car, which negligence placed them in a position that rendered it impossible to prevent the accident.

EXCESSIVE DAMAGES — REMITTITUR. — Where compensatory damages awarded by the jury is not justified by the evidence, the court will reverse the case unless a remittitur of the excess is duly entered in accordance with the direction of the court.

APPEAL from Lonoke Circuit Court. *Judgment affirmed.*

"Action by Wallace M. Harrell, as administrator of the estate of J. C. Gist, deceased, against the Little Rock & Memphis Railway Company, and the Little Rock & Argenta Street Railway

1. *Joint tort feasons — concurrent negligence.* — Where injuries are sustained by the concurring negligence of two parties they are both liable in damages to the party injured, if the injury would not have occurred from the negligence of one of them only. *City Electric R. Co. v. Conery*, 61 Ark. 381.

Injury at crossing — presumptive negligence. — Under the Arkansas statute (Sand. & H. Dig., § 6349) making railroads responsible for all damages to persons or property by the running of railway trains, the injury or killing of a person at a crossing is *prima facie* evidence of negligence. *Little Rock & Ft. S. Co. v. Blewitt*, 65 Ark. 235, 237. See *St. Louis, I. M. & S. R. Co. v. Neely*, 63 Ark. 636; *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136.

Negligence — care required of railroads — ordinary care. — It is said in *Little Rock & Ft. Smith R. Co. v. Parkhurst*, 36 Ark. 371, 376: "The ordinary care imposed upon railroads to be exercised by their employees, varies with the circumstances and the subject-matter endangered. Ordinary care requires more precaution in running through

the streets of a village or populous neighborhood, at night, than outlaying forests or prairie in daylight; and it is the instinct of humanity as well as a rule of law, that everywhere ordinary care requires more precautions against endangering the lives of persons than of cattle; still it is ordinary care in each case, which means such care as persons of ordinary prudence would use in similar circumstances." See, to the same effect, *St. L., I. M. & S. R. Co. v. Vincent*, 36 Ark. 451; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350. See also *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 461; *Brand v. Schenectady & T. R. Co.*, 8 Barb. (N. Y.) 368.

The railroad is held to reasonable care and diligence, to be determined according to the nature of the danger and the magnitude of the injury to be avoided. *St. L., I. M. & S. R. Co. v. Vincent*, 36 Ark. 451; *Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413, 416; *St. L., I. M. & S. R. Co. v. Freeman*, 36 Ark. 31.

Company, to recover damages for the negligent killing of his intestate, in a collision between their cars in the town of Argenta, on November 26, 1890, laying his damages at the sum of \$25,000. There was a verdict and judgment for the full amount claimed; motion for new trial, made by each of appellants, overruled; exceptions taken; bill of exceptions tendered and signed, and appeal taken to this court."

U. M. & G. B. ROSE, for appellant railroad company.

J. H. HARROD and E. A. BOLTON, for appellee.

Bunn, Ch. J.—The appellant street-car company in argument is made to defend mostly against the contention of plaintiff in the court below that a lien can be fixed upon its property for any judgment rendered in this action, under the act approved March, 19, 1889; and its counsel in their briefs do not make any specific objection to the instructions and admission of testimony.

The first contention of the appellant railroad company is that the court below erred in not permitting it to introduce other and previous acts of negligence of the street-car driver, Byers, at times and places near the time and place of the act complained of.

There are several different states of case in which the proposition of appellant's counsel is correct. Thus, where one uses defective machinery or appliances, and an accident occurs of which, in the very nature of things, it is impossible or impracticable to obtain any direct or positive proof of the particular fact—in such a case, evidence of accidents and instances similar to those in question, that have previously occurred, is admissible to show that the person using the machinery or appliances had previous knowledge, or should have had, of the defects by and through which the injury had been done; also the probability that the injury was the result thereof. The most frequent illustration of this rule is in the case of locomotive engines emitting an unusual amount of sparks by reason of imperfect spark arresters, and so forth. This, as is known, is the fruitful source of fires along railroad tracks; and, in all these cases, evidence of previous operations of the engines has been held admissible, not only as fixing notice, but under the doctrine of probabilities, as in the case of *Cleaveland v. Grand Trunk Railway Co.*, 42 Vt. 449, cited by counsel. So, also, does that rule hold good in regard to injuries occasioned by defective railroad track, as in the case of *Mobile Railroad v. Ashcraft*, 48 Ala. 15, also cited by counsel. This kind of evidence is also admissible to prove the habits of a

horse, when the question is whether he was injured through his fright or viciousness, there being no other way to determine the question, as in the case of *Whittier v. Franklin*, 46 N. H. 23.

But the rule in cases like the one under consideration, where the question is simply one of negligence or non-negligence on the part of a person on a particular occasion, is that such evidence is not admissible. See *Christensen v. Union Trunk Line* (Wash.), 32 Pac. Rep. 1018; *Towle v. Pac. Imp. Co.*, 33 Pac. Rep. 207; *McDonald v. Savoy*, 110 Mass. 49; *Hays v. Millar*, 77 Pa. St. 238; *Boick v. Bissell* (Mich.), 45 N. W. Rep. 55; *Atlanta, etc., R. Co. v. Newton*, 85 Ga. 517, 11 S. E. Rep. 776.

The second contention is that the instruction given by the court on its motion is erroneous, in that it instructs the jury that it was the duty of those in charge of the train "*to do all in their power to prevent the collision;*" whereas, as is contended, the trainmen were not held to the highest degree of care in respect to the deceased, he not being their passenger at the time. That position is correct in a sense, and yet it is misleading in the manner in which it is here stated. In the first place, the court below did not instruct the jury that the trainmen owed deceased, as a passenger on the street-car or otherwise, the *highest degree of care*, nor words to that effect, as the contention seems to imply, but the language of the court was that they should have done all in their power to prevent the collision "*when they discovered the street-car without a driver, or with a driver who was negligent in his duty, approaching and near the track, and in danger of a collision with the railroad train; and if, under such circumstances, they could have stopped the train in time to avoid the collision, and failed to do so, the railroad company is liable.*" To do all they could in the exigency stated by the court was nothing but ordinary and reasonable care and diligence under the circumstances; and the ordinary care to which non-carriers are bound is a care that varies with the circumstances of each case.

The third contention is that the court erred in refusing to give the fifth instruction asked by the defendant railroad company, which was to the effect that a passenger, in case of a collision, cannot recover for injuries occasioned thereby against the other party, if his own carrier is at fault. This doctrine had its origin in the English case of *Thorogood v. Bryan*, 8 C. B. 115, and all the American cases in which it has prevailed have been decided upon the authority of that case. It, however, has perhaps never

received anything more than a minority support in this country. That case has in recent years (1888) been brought on appeal to the House of Lords, and each and every one of the grounds upon which it rested has there been held to be unsound, and the case, consequently, has been overruled (1).

We do not regard the case of *Duggins v. Watson*, 15 Ark. 118, cited by counsel, as being strictly in point, although it does in a manner refer to the then English rule as announced in *Thorogood v. Bryan* as the law applicable to that case. However that may be, the law now is that where a passenger is injured in a collision, the non-carrier may be sued, notwithstanding the carrier is also at fault.

The fourth contention is that the court erred in giving the sixth and seventh instructions asked by the plaintiff. The majority of the court are of the opinion that the sixth instruction is abstract, but that the error is not prejudicial. The seventh instruction was properly given.*

The fifth contention is that it was error in the court to modify the first instruction asked by the defendant railroad company by the insertion of the words included in the brackets. The court, in the first part of the instruction, had declared the law to be that the mere fact of the accident raises a presumption of the negligence of the street car company, because deceased was its passenger at the time, but there is no presumption against the railroad company. The court then said to the jury that they would be justified in finding against the street car company from the mere fact of the accident, with the qualification in the brackets, "(unless the presumption is rebutted by the evidence in the whole case);" and then proceeds to instruct them that they cannot find against the railroad company unless its negligence is shown by a preponderance of evidence, as there is no presumption of its negligence in the case. We cannot see the error in this modification; and if there be such, it is, we think, harmless.

The answer to the sixth contention is that there is no evidence as to what were the duties of the street car driver, and it would be manifestly improper for the court to detail a set of duties and rules for his guidance in the way of instructions. There was no error in refusing the third instruction asked by the defendant

1. See note on the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, page, 145 *ante*.

railroad company. Besides, the law on the point was sufficiently declared in other instructions given.

We do not think the court erred in refusing the railroad company's fourth instruction. While it is doubtless true that the street car driver should have kept a lookout for trains crossing his track, yet, if he did not, that fact alone might not exonerate the railroad trainmen, even though they did everything they could to prevent the accident after they saw the street car. Something they did or neglected to do before seeing the street car might have placed them in a position which rendered it impossible — more difficult, at least — to prevent the accident. The instruction was misleading, and should have been refused.

The question whether or not the property of the street car company is the subject of the statutory lien for the judgment rendered in cases like this is presented to us only by the pleadings of the plaintiff, and he abandons that contention in his argument. We have not, therefore, that question before us.

This is a suit for compensatory damages only. By the first instruction given to the jury at the instance of the plaintiff, which is a copy of the statute on the subject, they were told, in effect, that if they should find for the plaintiff they "should give such damages as they shall deem a fair and just compensation to the wife and next of kin (in this case to the administrator) with reference to pecuniary injuries resulting from the death of deceased." There was not evidence to justify the jury in fixing the amount they did in this case. They simply gave the plaintiff the exact and full amount he claimed in his complaint, and apparently failed to consider very carefully the evidence as to that part of the case. We are unable to find from the testimony, viewing it in the most favorable light to the plaintiff, from any standpoint, that the damages could have much exceeded the sum of \$20,000, and in so far the verdict was without evidence to sustain it, and the judgment will be reversed for that cause unless the plaintiff will, within fifteen days, enter a remittitur down to the sum of \$20,000, in which case the judgment for that amount will be affirmed.

NOTE ON THE DOCTRINE OF IMPUTED NEGLIGENCE.

Negligence of parent not imputed to child. — In Arkansas the negligence of a parent or other person having custody of a child of tender years, will not be imputed to the child in case of an injury to the person of the latter. St. Louis, I. M. & S. R. Co. v. Denty, 63 Ark. 177, 185; St. Louis, I. M. & S. R. Co. v. Rexroad, 59 Ark. 180.

Regarding the doctrine of imputed negligence in case of personal injuries, there is a serious, if not a hopeless, conflict in the decisions of the various courts of this country. The doctrine may properly be said to have originated with *Thorogood v. Bryan*, cited in the preceding case reported, and discussed in the note on page 145, *ante*. Many of the American cases, *pro* and *con*, are cited below.

Doctrine denied. — The doctrine of imputed negligence is denied in the following cases: *Pratt Iron & Coal Co. v. Brawley*, 83 Ala. 371; *Bayshore R. Co. v. Harris*, 67 Ala. 6; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *St. Louis, I. M. & S. R. Co. v. Denty*, 63 Ark. 177, 185; *St. Louis, I. M. & S. R. Co. v. Rextroad*, 59 Ark. 180; *Bronson v. Southbury*, 37 Conn. 199; *Daley v. Norwich & W. N. Co.*, 26 Conn. 598; *Birge v. Gardiner*, 19 Conn. 507; *Chicago City R. Co. v. Robinson*, 127 Ill. 9; *Wymore v. Mahaska Co.*, 78 Iowa, 396; *Nesbit v. Garner*, 75 Iowa, 314; *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 78; *Battishill v. Humphreys*, 64 Mich. 494; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *St. Paul v. Kuby*, 8 Minn. 154; *Winters v. Kansas City Cable Co.*, 99 Mo. 509; *Frick v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 542; *Boland v. Missouri R. Co.*, 36 Mo. 485, 489, 490; *Huff v. Ames*, 16 Neb. 139; *Davis v. Guarnieri*, 45 Ohio St. 470; *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91; *Cleveland, C. C. & I. R. Co. v. Manson*, 30 Ohio St. 451, 470; *Bellefontaine & Ind. R. Co. v. Snyder*, 18 Ohio St. 399; *Erie City Passenger R. Co. v. Schuster*, 113 Pa. St. 412; *Philadelphia & Reading R. Co. v. Long*, 75 Pa. St. 257; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. St. 187; *Philadelphia & Reading R. Co. v. Spearen*, 47 Pa. St. 300; *Whirley v. Whiteman*, 1 Head (Tenn.) 610; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 68; *Texas, M. R. Co. v. Herbeck*, 60 Tex. 602; *Robinson v. Cone*, 22 Vt. 213; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455, 471; *Bass v. Litton*, 5 Car. & P. 407.

Doctrine followed. — The English doctrine of imputed negligence, as laid down in *Thorogood v. Bryan*, cited in the preceding case reported, and discussed in the note on page 145, *ante*, has been followed in its entirety or in a modified form, and applied in the following cases: *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513, 52 Cal. 602; *Schiehold v. North Beach, etc., R. Co.*, 40 Cal. 447; *Gavin v. Chicago*, 97 Ill. 66; *Toledo, W. & W., etc., R. Co. v. Grable*, 88 Ill. 441; *Evansville, etc., R. Co. v. Wolf*, 59 Ind. 89; *Hathaway v. Toledo, W. & W. R. Co.*, 46 Ind. 26; *Jeffersonville, etc., R. Co. v. Bowen*, 40 Ind. 545; *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 541; *Leslie v. Lewiston*, 62 Me. 468; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Lynch v. Smith*, 104 Mass. 52; *Gibbons v. Williams*, 135 Mass. 333; *Fitzgerald v. St. Paul, M. & M. R. Co.*, 29 Minn. 336; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 674; *Thurber v. Harlem Bridge etc., R. Co.*, 60 N. Y. 327; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Cosgrove v. Ogden*, 49 N. Y. 225; *Ihl v. Forty-second St. & G. St. R. Co.*, 47 N. Y. 317, 323; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615.

Parents not agent of child. — The court say in *Wymore v. Mahaska Co.*, 78 Iowa, 396, that "the parent is in no proper sense the agent of the child. The former is required to give the latter care, protection, and support, and in return may exact service and obedience. But these duties are imposed by law, and are not the result of contract between the parties." See *Bronson v. Southbury*, 37 Conn. 199; *Stafford v. Rubens*, 115 Ill. 196; *Chicago v. Keefe*, 114 Ill. 222; *Chicago & A. R. Co. v. Becker*, 84 Ill. 483; *Chicago v. Hesing*, 83 Ill. 204; *Chicago v. Mayor*, 18 Ill. 349; *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 535; *McMahon v. Northern*

Cent. R. Co., 39 Md. 439; *Collins v. South Boston Horse R. Co.*, 142 Mass. 301; *Winter v. Kansas City Cable R. Co.*, 99 Mo. 509; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671; *Boland v. Mo. R. Co.*, 36 Mo. 384; *Houghkirk v. Delaware & H. Canal Co.*, 28 Hun (N. Y.) 407, 63 How. Pr. (N. Y.) 328; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. St. 412; *Crissey v. Hestonville, M. & P. Pass. Co.*, 75 Pa. St. 83; *Whirley v. Whitman*, 1 Head (Tenn.) 620; *San Andrisso & A. Pass. R. Co. v. Moore*, 79 Tex. 643; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455.

An infant *non sui juris* is presumed incapable of judgment and discretion, and neither contributory negligence on its part or on the part of its parent or of any other person can be set up to defeat the recovery. *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371. See *Chicago City R. Co. v. Robinson*, 127 Ill. 9.

This is not the universal doctrine, but it is thought to be the better doctrine with the weight of decision although there are some strong courts and able opinions that maintain where a child is *non sui juris* it is the duty of its parents or those having charge of it, to judge for it; and if they neglect this, such negligence will be imputed to the child and the consequences suffered by it. See *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513; *Leslie v. Lewiston*, 62 Me. 468; *Brown v. European & N. A. R. Co.*, 58 Me. 384, *Messenger v. Dennie*, 137 Mass. 197; *Lynch v. Smith*, 104 Mass. 52; *Callahan v. Bean*, 9 Allen (Mass.) 401; *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283; *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123-132; *Battishall v. Humphreys*, 64 Mich. 494; *Ihl v. Forty-second St. & G. St. R. Co.*, 47 N. Y. 317-323; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613, 628; *Mangan v. Atherton*, L. R. 1 Exch. 239; *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. 287; *Waite v. Northeastern R. Co.*, El. Bl. & El. 719, 728.

In *Wymore v. Mahaska Co.*, 78 Iowa, 396, the injured child was taken into the wagon by its parent and exposed to the accident which resulted in its death, without volition on its part. The court say, "the child was certainly free from fault. If his parents, by their negligence, contributed to his death, that does not seem to us to be a sufficient reason for denying his estate relief."

It is said in the case of *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, that in an action by a child to recover damages for personal injuries inflicted by the negligent management of a grip car, the negligence of the child's parent in allowing it to go upon the public street unattended by a person of mature years constitutes no defense to the action.

In *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 672, a little girl, eight years old who in the presence of her father attempted to pass through a small aperture between two cars standing on the track, at a place where there was no public crossing, and was injured, *held*, that the father's negligence would be imputed to the child on a suit by the latter to recover damages for the injury sustained. See *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 132; *Waite v. Northeastern R. Co.*, El. Bl. & El. 728, 96 Eng. C. L. 728.

Negligence of person in charge not imputable to child. — In *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 78, it was held that the negligence of the person in whose charge the parents had placed the child could not be imputed to the parent and through the parent to the child. See *Pratt Coal & Iron Co. v. Brawley*,

83 Ala. 371; *Meeks v. So. Pac. R. Co.*, 52 Cal. 603; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 442; *Hathaway v. Toledo, W. & W. R. Co.*, 46 Ind. 52; *Wymore v. Mahaska Co.*, 78 Iowa, 376; *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 542; *Louisville & P. Canal Co. v. Murphy*, 72 Ky. (9 Bush) 522; *Leslie v. Lewiston*, 62 Me. 468; *Casey v. Smith*, 152 Mass. 294; *Messenger v. Dennie*, 137 Mass. 197; *Gibbons v. Williams*, 135 Mass. 335; *Lynch v. Smith*, 104 Mass. 57; *Winters v. Kansas City R. Co.*, 99 Mo. 509; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 674; *Basallion v. Blood*, 64 N. H. 656; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Davis v. Guarnieri*, 45 Ohio St. 470; *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91; *Cleveland, C. C. & I. R. Co. v. Manson*, 30 Ohio St. 451; *The Burgundia*, 29 Fed. Rep. 464.

When imputable to parent. — The negligence of a person in charge of an infant is imputable to the parent in an action by the latter to recover for injuries to the child. Thus, in *Reed v. Minneapolis St. R. Co.*, 34 Minn. 554, a person having a girl eight years old in charge went upon an adjoining track without having hold of the child, and the latter was run over by a car coming from an opposite direction at a negligent rate of speed, the court held that the contributory negligence of the person having the child in charge defeated the right of the father of the child to recover for the injuries.

Infant of discretion. — Where an infant has attained the age of discretion, and is capable of exercising judgment and discretion, he is held to such a degree of care as may reasonably be expected of one of his years and mental capacity. *Twist v. Winona & St. P. R. Co.*, 39 Minn. 164; *Cleveland Rolling Mills v. Corrigan*, 46 Ohio St. 283, 3 L. R. A. 385.

All that is required of an infant is care and prudence equal to his capacity; nothing else will bar his right of recovery. *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371; *Chicago City R. Co. v. Robinson*, 127 Ill. 9; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 191; *Kan. Pac. R. Co. v. Whipple*, 39 Kan. 531; *Collins v. So. Boston Horse R. Co.*, 142 Mass. 301; *Ecliff v. Wabash, St. L. & P. R. Co.*, 64 Mich. 196; *Duffy v. Mo. Pac. R. Co.*, 19 Mo. App. 380; *Finklestein v. N. Y. Cent. & H. R. R. Co.*, 41 Hun (N. Y.) 34; *Cleveland R. M. Co. v. Corrigan*, 46 Ohio St. 283; *Taylor v. Delaware & H. Canal Co.*, 113 Pa. St. 162; *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 530.

Degree of care required of child. — The degree of care, caution and prudence required of a child is not the same as that required of a person of age and discretion; the question of age and responsible discretion is for the jury. *Duffy v. Mo. Pac. R. Co.*, 19 Mo. App. 380; *Saare v. Union Pac. R. Co.*, 20 Mo. App. 211.

Although a child is old enough to go about, if *non sui juris* will be held incapable of contributory negligence. *Duffy v. Mo. Pac. R. Co.*, 19 Mo. 380. See *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 191.

Contributory negligence by child. — Negligence cannot be charged to a child of tender years. *Dealey v. Muller*, 149 Mass. 432; *Westbrook v. Mobile & O. R. Co.*, 66 Miss. 560; *Stone v. Dry Dock & E. B. & B. R. Co.*, 115 N. Y. 104.

Negligence cannot be imputed to a child *non sui juris* or a person who has not sufficient capacity or discretion to comprehend the danger and to use proper means to guard against it. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270. But see *Casey v. Smith*, 152 Mass. 294.

In *Malley v. Whittier Machine Co.*, 140 Mass. 337, where the plaintiff was six years and seven months old at the time of the accident, it was held that the child might be guilty of such contributory negligence as to defeat recovery.

See *O'Connor v. Boston & L. R. Co.*, 135 Mass. 352; *Messenger v. Dennie*, 173 Mass. 197; s. c., 141 Mass. 335.

A child seven years old is said to be too young to be guilty of contributory negligence in *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 191.

The general rule is that a child of tender years is incapable of exercising any judgment or discretion, and for that reason is not chargeable with contributory negligence. *Chicago City R. Co. v. Robinson*, 127 Ill. 9.

Where a child is capable of exercising judgment and discretion he is held to such degree of care and caution as might reasonably be expected of one of his age and mental capacity. *Twist v. Winona & St. P. R. Co.*, 39 Minn. 164; *Cleveland Rolling Mills Co. v. Corrigan*, 46 Ohio St. 283; *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 530; *Pratt Coal & Iron Co. v. Brawley*, 81 Ga. 371; *Western & A. R. Co. v. Young*, 81 Ga. 397; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531; *Illinois Cent. R. Co. v. Slater*, (Ill.) 21 N. E. 575.

Negligence of driver. — Where the negligence of the driver of a street car is the cause of the injury to an infant *non sui juris* he may recover regardless of the negligence of the infant or the person in charge of it. See *Collins v. South Boston Horse Car Co.*, 142 Mass. 301; *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236.

Contributory negligence of a carrier cannot be imputed to a passenger. *Nesbit v. Garner*, 75 Iowa, 314. See *New York, P. & N. R. Co. v. Cooper*, 85 Va. 939; *Whelan v. New York, L. E. & W. R. Co.*, 38 Fed. Rep. 15; *Cuddy v. Horn*, 46 Mich. 596; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364.

The negligence of a carrier in whose train a passenger is riding and sustains personal injuries is not imputable to him. *Flaherty v. No. Pac. R. Co.*, 39 Minn. 328.

Where a person is riding with another by invitation and is injured in a collision due to the negligence of a third person he may recover even though the driver of the vehicle in which he was riding is negligent; such negligence will not be imputed to him. *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514; *Michigan City v. Boeckling*, 122 Ind. 39; *Nisbet v. Garner*, 75 Iowa, 314; *State v. Boston & M. R. Co.*, 80 Me. 430; *Kingstown v. Musgrove*, 116 Ind. 121; *Sheffield v. Central W. Tel. Co.*, 36 Fed. Rep. 164; *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 316; *East Tenn., V. & G. R. Co. v. Markens*, 86 Ga. 60; *Elyton Land Co. v. Mingea*, 89 Ala. 521.

Contributory negligence of a driver of the car on which the injured person was riding may be imputed to the injured person where such negligence was gross. *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa, 523. In *Yahn v. Ottumwa*, 60 Iowa, 429, it was held that the negligence of the plaintiff's husband, with whom she was riding at the time, and which contributed to the injury, would be imputed to her and defeat recovery.

Negligence of parent—injury to child—suit by parent. — It seems to be the universal rule that where injuries to a child are due to the negligence of the parent, the parent will not be able to recover damages therefor in his own right. *Wymore v. Mahaska Co.*, 78 Iowa, 396. See *Williams v. So. & N. Ala. R. Co.*, 91 Ala. 635; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 375; *Kyne v. Wilmington & N. R. Co.*, 8 Houst. (Del.) 185; *Foster v. Pusey*, 8 Houst. (Del.) 168; *Giles v. Diamond St. Iron Works*, 7 Houst. (Del.) 453; *Evansville & C. R. Co. v. Wolf*, 59 Ind. 90; *Albertson v. Keokuk & D. M. R. Co.*, 48 Iowa, 292; *Hurst v. Detroit City R. Co.*, 84 Mich. 539; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509; *Huff v. Ames*, 16 Neb. 139; *Bellefontaine & I. R. Co. v. Snyder*, 24

Ohio St. 670; Erie City Pass. R. Co. v. Schuster, 113 Pa. St. 412; Smith v. Hestonville, M. & F. R. Co., 92 Pa. St. 450; Glassey v. Hestonville, M. & F. R. Co., 57 Pa. St. 172.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. LEDBETTER, ADM'R.

Supreme Court, Arkansas, May Term, 1885.

[Reported in 46 Ark. 246.]

TRESPASSER ON FREIGHT CAR KILLED IN COLLISION — RAILROAD NOT LIABLE. — Where plaintiff's intestate, who was killed in a collision between freight cars, got upon defendant's freight car without right, he was a mere intruder and trespasser, and the only duty the defendant owed him was not to injure him wantonly or wilfully, and even if the engineer of the train knew of his presence on the car, and the engineer was negligent in managing the train, defendant was not liable where the injury could not be foreseen as a probable consequence.

APPEAL from judgment for plaintiff for \$2,000, rendered in the Poinsett Circuit Court. The facts are sufficiently stated in the opinion. *Judgment reversed.*

DODGE & JOHNSON, for appellant.

J. E. RIDDICK, for appellee.

Smith, J. — Frank Jones was in the employment of a contractor for building bridges on a branch road, which the defendant company was constructing, in the year 1882, from Knobel down Crowley's Ridge in the direction of Forrest City. His office was at Knobel, and his principal duties were to receive consignments of timber and materials, that came to Knobel for his employer, and re-ship them down the branch roads to points where they might be needed. On an afternoon in June of that year, a freight train with one flat car laden with lumber for Jones' employer, stopped at the depot of Knobel. This car of lumber was at the head of the train, next to and immediately in rear of the engine and tender. The conductor alighted from the train and went into the depot building to deliver his bills of lading and transact other necessary business with the station agent. Before this flat car had been detached from the train and placed upon the side track, Jones mounted upon it at its rear end. None of the train hands observed him, except a brakeman, who ordered him to get off, as it was against the rules of the company for freight trains to carry persons unconnected with the train.

But Jones refused to get down, and the brakeman went to another part of the train to attend to a hot box. The trainmen then proceeded to switch off this flat car onto the side track. This was done by uncoupling the car and taking it with the locomotive past the switch target, and, when the switch was opened, backing it on the side track. Then, when the locomotive was well under way in its backward movement, the pin which held this flat car to the tender was pulled out, the engine was reversed and returned to the main track, and the car, by the impetus acquired by the parting kick, was sent off in the desired direction. In this case the engine was backing with considerable speed, and great, and perhaps unnecessary, force was used in sending off the detached car, for it rolled on until it collided with another car standing on the side track, and the drawheads of both cars were stove in. As the engine was passing the switch another brakeman warned Jones to look out, as the car upon which he was riding was about to be set out on the siding. He replied that he knew what he was about, and that he was too old a hand at the business to be in any danger. But about the time the collision took place, he endeavored to climb up on top of the pile of lumber and was thrown under the wheels of the car, which passed over him, inflicting injuries from which he died. His administrator brought this action against the railroad company, alleging that his death was caused by the negligent operation of its trains, and recovered a verdict for \$2,000.

The proof was that the presence of Jones on the car was in fact unknown to all of the train hands except the two brakemen. Some bystanders, who witnessed the accident, testified that the engineer might have seen Jones if he had looked back; but they were ignorant whether he did look back. The engineer and fireman both swore that they had no reason to suspect that any person was on that car; and that it was impossible, on account of the intervening tender and lumber, to see Jones at the end of the car from their places without leaning over at the side of the cab. It is quite possible that the spectators were deceived into the belief that Jones was visible to the engineer from the fact that both parties were in plain view of themselves.

Upon this evidence the jury were charged, in substance, that although Jones may have been unlawfully upon the car, yet if the engineer in charge had knowledge of his presence, and was guilty of negligence in the transfer of the car from one track to the

other, in consequence of which Jones lost his life, the defendant would be liable. And the court refused the following request, and similar ones embodying the same idea.

“The jury are instructed, that a person who has no lawful right to be upon a vehicle, whether a railroad car or other vehicle, and is there without the consent of the carrier or his duly authorized agent, is a trespasser, and cannot recover damages for any injuries happening to him, unless the said injury was caused by wilful and intentional negligence on the part of the carrier, occurring after the latter has had notice of such person’s presence on the vehicle.

“If, therefore, the jury find, from the evidence, that the deceased was on the defendant’s flat car, at the time loaded with lumber, without the consent of the conductor of said train, the court tells you that he was there as a trespasser, and you will find for the defendant in this action; unless you further find, from the evidence, that the injury was caused by wilful and intentional negligence or carelessness of the defendant’s engineer after he knew deceased was on the said car.” The first and most material inquiry is, what right had Jones to be on the car, and what corresponding obligation rested upon the company to provide for his safety. For, when it is said that it is the duty of a railway company to operate its trains with care, this is in reference to those who are in a position to complain of its neglect. It cannot be expected to run its freight trains with a constant view to the probability that unauthorized persons may be secreted or lurking about the trains. Thus the tramp who steals a ride cannot recover damages for a personal injury suffered by him in consequence of defective machinery, or an insecure roadbed, or the negligence of the company’s servants; because in these matters the company owes him no duty.

Now, Jones was not a passenger; he was not an employee of the company; he had no sort of connection with the train; no invitation or inducement was extended to him to get on the car. Whatever may have been his motive, we may be sure that it was for his own pleasure or convenience that he acted. He had no right to meddle with the lumber until it was delivered to him by the station agent, and that could only be after the car upon which it was loaded was at rest upon the side track and separated from the train. He had no authority to direct at what point this car should be left, for the trainmen take their directions from the

conductor, who in such matters receives his directions from the station agent. Consequently he was a mere intruder and trespasser, who had, of his own choice and without the slightest necessity, placed himself in a situation where he was liable to be injured. He was a man thirty-five years old, and presumably of sufficient discretion to understand that he incurred some peril. Moreover, he was twice warned that he had no business there, and that it was dangerous. He voluntarily took whatever risks were incident to his situation while the car was in course of being shifted from the main track to the side track. And the servants of the company were not bound to conduct that operation with any special reference to his safety. They had the right to presume that no one was on the car; for no one had any business to be there. And the only duty that the defendant corporation owed him was the negative duty not to injure him wantonly or wilfully, or by such gross and reckless negligence in the management of the car, after the discovery that he was upon it, as would be equivalent to intentional mischief. *Cooley on Torts*, 660; 1 *Thomp. on Neg.*, 448-9, and cases cited; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Johnson v. B. & M. R. R.*, 125 Mass. 75; *Morrissey v. R. R.*, 126 Mass. 380; *Railroad Co. v. Norton*, 24 Pa. St. 465; *Beam v. R. R. Co.*, 49 Ind. 93.

If the jury found, as they must have found under the directions, that the engineer was aware of the presence of Jones, their verdict was without evidence to rest upon. But even if he knew this fact, and was negligent in handling his engine and this car, it would not follow that the company was liable in this action. For it could not be foreseen, as a probable consequence, that Jones would be thrown under the wheels by the force of the collision.

The uncontroverted facts of the case show contributory negligence in the plaintiff's intestate. And there is certainly nothing in the circumstances from which a jury could infer that the hurt was intended, or contemplated as a probable result, by any person connected with the train.

The judgment is reversed and the cause remanded for another trial.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. AVEN.

Supreme Court, Arkansas, October Term, 1895.

[Reported in 61 Ark. 141.]

HIGHWAY CROSSING — DUTY OF RAILROAD COMPANY AT. — Under the Arkansas statute, wherever a railroad company builds its road across a public highway, they are required to so construct the approaches to the railroad that they shall not be at a greater elevation or depression than one perpendicular foot in five, and to keep the same in good repair; and in the construction and maintenance thereof are bound to use reasonable skill and diligence according to the circumstances.

BRIDGES OVER STREAMS AND EXCAVATIONS — SHYING HORSES. — Where a railroad constructs a bridge over a stream or excavation, it is its duty, in the construction and maintenance, to do whatever is practicable and reasonable to avert threatened danger, putting up such rails, guards or barriers necessary for that purpose, and to protect from danger from shying horses.

DEFECTIVE CROSSING — LIABILITY. — Where a traveler is injured at a defective railway crossing he will be entitled to recover from the railroad company, although the horse which he was driving had become frightened and unmanageable, if the accident would not have happened except for the company's negligence in failing to keep the crossing in proper repair.

CROSSING — MAINTENANCE OF BRIDGE — INSTRUCTIONS. — In an action to recover damages at a railway crossing because of its alleged defects, an instruction that if, in the construction of a railway at and across a public highway, "the railroad company cuts a ditch along the side of the track and across the highway, it is its duty to construct and maintain a safe and suitable bridge across and over said ditch," is erroneous in making the railroad company a guarantor of the safety of travelers.

DEGREE OF DILIGENCE REQUIRED — INSTRUCTION. — In an action to recover damages for personal injuries sustained at a railway crossing by reason of its alleged defects an instruction that if the construction of defendant's railroad made it necessary to erect a bridge at a public crossing to make the highway available, it was the railroad's duty to so erect the bridge that the highway should be restored in as passable a condition as was consistent with the use of the railroad, and if guard rails were required for such purpose to place them on the bridge, is erroneous in making the company liable for an accident thereon, although it had exercised ordinary care and diligence in maintaining the bridge.

APPEAL from judgment for plaintiff for \$10,000 rendered in the St. Francis Circuit Court. The facts sufficiently appear in the opinion. *Judgment reversed.*

DODGE & JOHNSON, for appellant.

S. R. COCKRILL, for appellee.

Battle, J. — John W. Aven brought this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for a personal injury which he alleges was received by him through the negligent construction and maintenance of a bridge and the approaches thereto, which constituted the highway crossing of the defendant's railway track.

In 1882 the defendant constructed a railway over a public road in St. Francis county. It erected an embankment six feet high, and dug a ditch on the east side thereof ten feet deep, eighteen feet wide at the top, and five feet and four inches at the bottom, and thereby rendered the road impassable. In order to restore the road to use, and make a crossing for it over the railway, it made an inclined embankment to its track on the west, and placed a bridge across the ditch on the east, and approaches to the same. The bridge was twenty-five and one-half feet long, and from twelve to sixteen feet wide. One witness said that the principal part of the flooring of the bridge was sixteen feet long, and that there were two or three planks near the center twelve feet in length; and another said about one-half was twelve feet long, and the other half sixteen feet, and that the short planks began about the center of the bridge, and extended to the east end of it. "The fall of the approaches to the bridge was about twenty-one inches to ten feet, on the west side of the bridge, — the side upon which the plaintiff approached at the time" the injury was received. The incline on the west side of the embankment was very steep. There were no railings or banisters on the bridge at the time of the injury.

On the morning of the 17th of September, 1892, the plaintiff approached the bridge from the west, driving a horse and cart or buggy. What followed he relates as follows: "I drove off, and my mare trotted on up to the railroad dump, and walked on the railroad track, and, just about the time the cart got in the center of the track, the horse took a scare from something, — I never have known what, — but she made a fearful lunge, and jumped just as far as she could, and partially fell right at the edge of the bridge; and as she came up I made an effort to jump out of the cart, and as I did that she came up, and went right over the bridge. The shafts of my cart struck the bridge, and she jumped square down on her head, and I and the cart and all, pitched right over into the ditch, and struck the bottom." The

evidence shows that she jumped off about the center of the bridge. In the fall the plaintiff's right leg was broken just above the ankle joint; both bones were broken; one pierced through the skin at the ankle. The joint was opened, and the membranes around it were ruptured, and the synovial fluid escaped. He was confined to his bed many weeks, and suffered excruciating pain.

Plaintiff considered his mare safe, and testified that he never knew her to become frightened before she leaped from the bridge, but she was a "high-headed animal." His wife constantly refused to cross the bridge with him, in his buggy, while driving the mare, and would get out and walk across; but she did ride over it with him when he was driving another horse, which died prior to the time he purchased the mare. He further testified that he never knew that the mare was partially blind, but she had a white speck in one eye. He traded her about four weeks after he was injured, and while he was confined to the house. One witness testified that she was blind in one eye; and another, that he knew that she was a "fiery and high-headed animal." One witness testified that he asked the plaintiff, on the day of the accident, how it happened, and he replied, "I can't tell, but she must have had a fit."

The court instructed the jury, in part, over the objections of the defendant, as follows:

"1. The court instructs the jury that, where a railroad is built across a public highway, it is the duty of the railroad company to construct and maintain proper crossings for the benefit of the traveling public; and if, in the construction of the railway at and across the public highway, the railroad company cuts a ditch along the side of the track, and across the highway, it is its duty to construct and maintain a safe and suitable bridge across and over said ditch, so that the highway may be restored to a safe condition for travel.

"2. If the jury find from the evidence that the defendant cut a ditch across the public highway, as alleged in the complaint, and failed and neglected to erect and maintain a safe and suitable bridge across the same, and that the failure and neglect of the defendant railroad company to construct and maintain a safe and suitable bridge across the said ditch was the proximate cause of the injury to plaintiff, then you should find for the plaintiff.

"3. If the jury find from the evidence that the defendant railroad company cut a ditch across the public highway, as alleged

in the complaint, and that it constructed a bridge across the same, then it is a question of fact, for you to determine, whether or not the same was sustained, and maintained in a safe and suitable manner, and whether or not it was necessary that guard rails should have been constructed and maintained on said bridge; and if you find that it was necessary, and that the defendant failed and neglected to construct and maintain such guard rails, and that its negligence and failure in this behalf was the proximate cause of the injury and damage to plaintiff, then you should find for the plaintiff.

“4. If the jury find from the evidence that the construction of the said railway made it necessary for a bridge to be erected at the crossing of the railroad and public highway, in order to make this highway available to the public, the court instructs you that it was the duty of the railroad to erect and maintain such bridge so that the highway should be restored to as passable a condition, and so kept, as was consistent with the use of the railroad company, and, if guard rails were required for that purpose, then it was the duty of the railroad company to place guard rails or banisters upon the bridge; and if you find that such was necessary, and that the railroad failed and neglected to provide and maintain the same, and that the absence of the said guard rails or banisters were the proximate cause of the injury to plaintiff, then you will find for the plaintiff.”

And instructed the jury as follows at the request of the defendant:

“You are instructed, if you find from the evidence that the plaintiff's horse had a fit upon him, and was thereby rendered uncontrollable, at the time of the accident, and that without such fit, and the consequent escape from control, the accident would not have happened, you will find for the defendant.”

“If the jury believe from the evidence that plaintiff's horse was, at the time of the accident, blind in one eye, and that this fact was known to plaintiff, and further, believe from the evidence that a reasonable and prudent man would not have attempted to drive such a horse across such a bridge as this is described to be, in the manner that plaintiff attempted to drive his horse, then you are instructed that the plaintiff was guilty of negligence in so attempting to drive over said bridge; and, if you find that such act on his part contributed to the injury, you will find for the defendant.”

And refused to give the following at the request of the defendant:

“ [You are instructed that there is no statute in this State prescribing that bridges of the character of this one should be provided with banisters or side rails], and unless you find from the evidence that the bridge in question was constructed and maintained, as to banisters and side rails, in a manner different from what a reasonable and prudent man would have done under the circumstances, then you will find that there was no negligence on the part of the railway company with reference to the construction and maintenance thereof, and you will find for the defendant.” But modified it by striking out the words in brackets, and gave it as amended, over the objections of the defendant.

And the defendant asked, and the court refused to give, the following:

“ You are instructed, that if you find from the evidence that the plaintiff’s horse became frightened, and by reason thereof plaintiff was unable to control him, and that without such fright the accident would not have happened, you will find for the defendant.”

The jury returned a verdict in favor of plaintiff for \$10,000. A motion for a new trial was filed by the defendant, and was overruled by the court. Exceptions were duly saved, and the defendant appealed.

In returning a verdict in favor of the plaintiff, the jury necessarily found that the evidence was insufficient to authorize them to return a verdict in favor of the appellant under the instructions given at its request. There being evidence to sustain them in that respect, we are concluded by the verdict to that extent, and the appellee stands acquitted of contributory negligence, as to this appeal.

The main questions for our consideration are presented by the instructions given and refused by the court, and they are: 1. What was the duty of appellant as to the construction of the highway crossing over its railway track? And, 2, what is its liability for the injuries received by the appellee, they being results of a leap of his horse from the bridge, which leap was caused by fright?

As to the duty of railroad companies, the statutes provide that, whenever they shall build a railway across any public road or highway in this State, they shall so construct the crossing, or so alter

the roadbed of such public road or highway, that the approaches to the railroad bed, on either side, shall be made and kept in good repair, "at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance, such elevation or depression being caused by reason of the construction of said railroad." Except as to the elevation or depression, the same duties rest upon them as are imposed on municipal corporations, which are bound to keep their streets in repair. In neither case is there any exact legal standard of care to be exercised in the construction or maintenance of public streets, roads, or crossings. They are only bound to use reasonable skill and diligence in constructing and maintaining in repair these highways, according to circumstances. They are not insurers of the safety of travelers, and are not bound to provide against everything that may happen on the highway, "but only for such things as ordinarily exist, or such as may be reasonably expected to occur." Where no danger may be anticipated, on account of the peculiar location of the highway, no vigilance is required for protection against liability for injuries; but where the road, bridge, or other public highway, by reason of its proximity to or construction over excavations, declivities, streams of water, or other places of peril, is manifestly so unsafe as to imperil the life or body of the traveler, it is the duty of the corporations or persons whose duty it is to keep it in repair to do whatever is practicable and reasonable to avert the threatened danger. If rails, guards or barriers be reasonably necessary for that purpose, and practicable, it is their duty to construct and maintain them in the places needed. *Ring v. City of Cohoes*, 77 N. Y. 83; *Plymouth Tp. v. Graver*, 125 Pa. St. 24; *Hey v. Philadelphia*, 81 Pa. St. 44; *Horstick v. Dunkle*, 145 Pa. St. 220; *Hunt v. Mayor*, 109 N. Y. 134; *Whart. Neg.* (2d ed.), §§ 103, 104; 2 *Dill. Munic. Corp.* (4th ed.), §§ 1005, 1007, 1015, 1019, 1020.

Corporations bound to build, or keep in repair, highways (bridges included) are not required to construct or maintain them in such a condition "that a traveler thereon may with safety run his horses at a furious rate of speed, or drive thereon unmanageable horses, nor are they bound to keep them in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away." Highways are not built for such purposes. They are extraordinary incidents, out of the usual course of travel, for which no

provision is required to be made. But, as all horses are, more or less, prone to shy and deflect from the beaten track, all public highways should be built and maintained in such a manner as to provide for the ordinary shying or starting of horses, and consequent deviations. Where practicable, the highway should be sufficiently wide and reasonably safe for that purpose, and guard rails or barriers should be constructed and maintained where necessary to protect the traveler against injuries from accidents which may be reasonably anticipated from such shying. To this end, the corporations charged with the duty of constructing or maintaining the highway are only bound to the exercise of ordinary care and diligence. *Baltimore, etc., Turnpike Co. v. Bateman*, 68 Md. 389, and see other authorities above cited.

As to the limits of liability in cases where an unruly or frightened horse is one of the causes of an accident on a public highway, there is a diversity of opinion, and some difficulty. In *Titus v. Northbridge*, 97 Mass. 258, the court said: "When a horse, while being driven with due care upon a highway, which a town is bound to keep in repair, becomes, by reason of fright, disease, or viciousness, actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable in this sense, if he merely shies or starts or is momentarily not controlled by his driver." *Fogg v. Nahant*, 98 Mass. 578, 106 Mass. 278. In Maine the courts take the same view. *Aldrich v. Gorham*, 77 Me. 287. "In such cases," says Earl, J., "it is said that the conduct of the horse is the primary cause of the accident; that there are two efficient, independent proximate causes, the primary cause being one for which the corporation is not liable, and as to which the traveler himself is in no fault, and the other being a defect in the highway; and hence, that it is impossible to determine that the accident would have happened but for the primary cause. But, within the rule laid down in those states, a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by his driver." *Ring v. City of Cohoes*, 77 N. Y. 83.

In *Hinckley v. Somerset*, 145 Mass. 333, 336, the following

rule was approved: "When the horse shies, and comes upon something which is claimed to be a defect, and which it is claimed the vehicle would not have come in contact with except for the want of a suitable railing, the question for the jury is this: Can we say that if there had been a suitable railing there the control of the horse would have been regained by his driver, and the accident and injury would not have happened? If the plaintiff makes it appear, by a fair preponderance of all the evidence, that that was the state of things, then he cannot recover."

In *Baldwin v. Turnpike Co.*, 40 Conn. 238, Minor, J., said: "The failure of a traveler to be continually present with his team up to the time and place of injury, when that failure proceeds from some cause entirely beyond his control, and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct cause of the same is the negligence of some other party; the loss should be charged upon the party guilty of the first and only negligence with reference to the matter." And in the same case the rule is said to be this: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable. Nor will the fact that the horse of plaintiff was uncontrolled some distance before the injury change or in any way affect the liability of the defendants."

After stating the rule laid down in this case, the court, in *Ring v. City of Cohoes*, 77 N. Y. 83, said: "This appears to us to be the reasonable rule. It exacts no duty from municipalities which has not always rested upon them. They must use proper care and vigilance to keep their streets and highways in a reasonably safe and convenient condition for travel. This is an absolute duty which they owe to all travelers; and when that duty is not discharged, and, in consequence thereof, a traveler is injured, without any fault on his part, they incur liability. They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads; and if they do not, and a traveler is injured by culpable defects in the road, it is no defense that his horse was at the time running away, or was beyond his control."

The rule laid down and followed in the New York and Connecticut cases was adopted and enforced in the following and

other causes: *Plymouth Tp. v. Graver*, 125 Pa. St. 24; *Burrell Tp. v. Uncapher*, 117 Pa. St. 353; *Horstick v. Dunkle*, 145 Pa. St. 220; *Hull v. City of Kansas*, 54 Mo. 598; *Hunt v. Pownall*, 9 Vt. 411; *Baltimore, etc., Turnpike Co. v. Bateman*, 68 Md. 389; *Byerly v. Anamosa*, 79 Iowa, 204.

The rule maintained by the New York and Connecticut courts, it seems to us, is reasonable, and sustained by the weight of authority. We see no good and sufficient reason for holding a municipality or corporation, which is bound to keep a highway in repair, liable for damages occasioned by a horse shying, starting or backing, and coming, or bringing a vehicle, in contact with a culpable defect in the highway, when at the time he was momentarily not controlled or uncontrollable, and that it is not liable if the horse had escaped control and was running away. In neither case is the corporation liable if it had done its duty in keeping the highway in repair, or the accident would not have happened if the rider or driver had exercised ordinary care, or would have occurred although the corporation had discharged its duties. In the former case the corporation is liable because it is its duty to use reasonable diligence to so construct and maintain the highway as to avoid accidents from the shying, starting, or backing of horses; in the latter case it should be liable, because it had not done its duty, and the accident would not have happened if it had. *Palmer v. Andover*, 2 Cush. 600; *Houfe v. Town of Fulton*, 29 Wis. 296; 2 Dill. Munic. Corp. (4th ed.), § 1005. In both cases the damage was occasioned by the neglect of the corporation to discharge its duties. Why should it not be liable in the latter as in the former case? In the latter case the running away or action of the horse was an accidental occurrence for which the rider or driver was not responsible. *Ring v. City of Cohoes*, 77 N. Y. 83. In both cases the action of the horse and the neglect of the corporation were proximate and efficient causes of the accident, and the injury is attributable to the latter; and the corporation should be liable, if at all, in either, on the ground it failed to perform its duty to the injured party. *Plymouth Tp. v. Graver*, 125 Pa. St. 24; *Ring v. City of Cohoes*, *supra*; *Shearm. & Redf., Neg.* 10; 2 *Thomp., Neg.*, p. 1085; 2 Dill. Munic. Corp. (4th ed.), §§ 1007, 1020.

Something was said in *Railway Co. v. Roberts*, 56 Ark. 387, which is, at least apparently, inconsistent with the view we have taken in this case. In that case the team of plaintiff's intestate

ran away and carried him, without his will, over the public highway crossing of the railway track, where he was thrown from the wagon in which he was riding, and killed by a passing train. "There was testimony that the crossing was defective; also, that a wagon could have been driven over it safely at an ordinary rate of speed." In speaking of an instruction given to the jury by the trial court, this court said: "The effect of that instruction was to direct a verdict for the plaintiff if the jury found that the injury to his intestate was caused by the defendant's negligence, either in blowing off steam, or in failing to keep the crossing in repair. It made the defendant's liability the same in either case, and the plaintiff was thus allowed to recover if the jury found there was negligence as to the crossing, although they were unable to find that there was any whatever in frightening the team. *But all the evidence shows that the proximate cause of the injury was the frightening the team.* Billman v. Railway Co., 76 Ind. 166. *If that was due to the company's negligence, it was liable for all the consequences resulting directly from it; otherwise, it was liable for none of them. The deceased was not injured in driving, or attempting to drive, over the crossing. He was carried there involuntarily by the frightened team, and the defendant was not responsible for his being there, if its negligence was not the cause of the fright to the team.* The question as to the company's liability would not be changed if it were shown that the condition of the crossing was perfect, and that the deceased would have been carried safely over it but for a defect in the wagon. The condition of the crossing was not, therefor, material to the issue."

From this it appears that the court found that "all the evidence shows that the proximate cause of the injury was the frightening of the team;" that the deceased was carried to the crossing against his will; that the defendant was not responsible for his being there; and hence the instruction as to the crossing was improper. It does not appear from the report of the case that there was any evidence showing that the accident was directly or indirectly occasioned through the failure of the defendant to perform its duty in keeping the crossing in repair. At all events, it does not appear that the question in the present case was much considered, if at all, in Railway Co. v. Roberts. What, therefore, was said in that case should not be controlling as to the question in this.

Were the instructions given in the case under consideration correct? The trial court told the jury that it was the duty of appellant to erect and maintain a safe and suitable bridge across and over the ditch cut by it along the side of its railway track. That is not true. The appellant did not guarantee the safety of travelers in passing over the bridge. The same duty rested upon it as upon municipal corporations bound to keep streets in repair, and it is subject to liability for a failure to perform them. It was simply bound to exercise common prudence and ordinary care and diligence in making the bridge safe.

It is true that the court instructed the jury that unless they found from the evidence that the bridge was "constructed and maintained, as to banisters and side rails, in a manner different from what a reasonable and prudent man would have done under the circumstances," then they should find "that there was no negligence on the part of the railway company with reference to the construction and maintenance thereof;" but it is also true that it instructed the jury that if "the construction of the railway made it necessary for a bridge to be erected at the crossing of the railroad and public way, in order to make this highway available to the public, thence it was the duty of the railroad to erect and maintain such bridge so that the highway should be restored to *as passable a condition, and so kept, as was consistent with the use of the railroad company*, and, if guard rails were required for that purpose, then it was the duty of the railroad company to place guard rails or banisters upon the bridge." These instructions are not explanatory, but contradictory, of each other. If the latter had stopped at saying that it was the duty of the railroad company to erect and maintain a bridge in a passable condition, it would have meant that the bridge should have been placed and kept in such a condition that travelers could go over it. But it did not stop there. It meant more. It said that the bridge must be in "as passable a condition, and so kept, as was *consistent* with the use of the railroad company," implying that the bridge must be made and kept as safe as it could be consistently with the right of the company to use its railway track. If it did not mean this, why add, "and, if guard rails were required for that purpose, then it was the duty of the railroad company to place guard rails or banisters upon the bridge?" The crossing would have been passable without guard rails or banisters. Construed in the manner indicated, the jury were virtually informed

by it that it was the absolute duty of the railroad company to place the guard rails upon the bridge, because they would unquestionably have added to the safety of the bridge, and would not have interfered with the use of the railway track by the appellant; and the two instructions are in conflict.

The latter instruction is objectionable for another reason: Construed in the manner indicated, it made it the duty of the jury to return a verdict in favor of the plaintiff on the conditions named therein, notwithstanding it had appeared to them that the accident would have happened if the defendant had exercised ordinary care and diligence in constructing and maintaining the bridge, and made the appellant liable when appellee was injured through no default of duty on its part.

As the judgment of the trial court will be reversed, we express no opinion as to the amount of the verdict.

Reversed and remanded for a new trial.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. LEWIS.

Supreme Court, Arkansas, April, 1895.

[Reported in 60 Ark. 409.]

RAILWAY CROSSING — NEGLIGENCE IN BLOWING OFF STEAM AND FRIGHTENING TEAM. — In an action for damages for personal injuries sustained by a collision with defendant's railway train at a highway crossing, where there is evidence tending to show that the accident was caused by the negligence of the defendant's trainmen in blowing off steam and frightening the plaintiff's team which became unmanageable and ran away and onto the crossing where the accident occurred, it is for the jury to say whether the accident was occasioned by the negligence of the defendant's servants.

Railroad Co. v. Roberts, 56 Ark. 387. *followed*.

NEGLIGENCE. — The term "negligence" is relative, and its application depends upon the situation of the parties, and the degree of care and vigilance the circumstances confronting them reasonably require.

SIGNALING AT CROSSINGS. — The statutory signals required at crossings must be given in a prudent and careful manner, such as the circumstances and surroundings require; and where it is apparent that a team upon a highway has become frightened at the sound of the whistle, and its continuance is endangering the safety of the individual, it is the duty of the engineer to stop the sound of the whistle and change the signal.

DUTY TO STOP TRAIN — ORDINARY PRUDENCE — QUESTION FOR JURY. — In a case where it appears that, for any cause, a person at the

crossing or approaching it is heedless, or unable to escape danger by collision, it is the duty of the engineer, if he can do so by ordinary means, to stop the train, as prudence may require; and in case of accident, it is for the jury to say whether the engineer exercised ordinary prudence under the circumstances.

BLOWING OFF STEAM — QUESTION OF NEGLIGENCE FOR JURY. —

The question whether or not the blowing off of steam was, under the circumstances, necessary for the ordinary operation of the train, is for the jury to determine.

TRAIN APPROACHING CROSSING — GIVING STATUTORY SIGNAL — NEGLIGENCE — CHARGE TO JURY. —

In an action for damages for personal injuries sustained in a collision at a railway crossing it is not error to instruct the jury that if the team was frightened only at the statutory signals made in an ordinarily careful manner, and injury resulted, no liability attached; but that it was the duty of engineers in charge of trains approaching crossings, or when running near a public highway, to use ordinary care to discover travelers on the highway, and to so manage the train as not carelessly or negligently to injure travelers.

DUTY OF ENGINEERS TO KEEP LOOKOUT — CARE AND PRUDENCE. —

It is the duty of engineers to keep a lookout, and when running near and parallel with a public highway and crossing it, to act prudently and carefully, having a regard for travelers upon the highway and their safety; and travelers have a right to assume that such care and prudence will be exercised by the engineer (1).

APPEAL from Greene Circuit Court.

Action by W. F. Lewis against the St. Louis, Iron Mountain and Southern Railway Company to recover for personal injuries caused by the negligence of defendant's trainmen. Verdict and judgment for \$3,000. Defendant appeals. The facts are sufficiently stated in the opinion. *Judgment affirmed.*

DODGE & JOHNSON, for appellant.

W. F. LEWIS, *pro se.*

Bourland, SPECIAL JUDGE. — This was a suit for personal injuries alleged to have been occasioned by the negligence of appellant's employees in charge of a running train. There was a verdict and judgment for \$3,000 in favor of Lewis, and the appellant seeks a reversal here on the following specifications of error made in its motion for a new trial: 1. That the verdict is contrary to the law and evidence. 2. That the court erred in giving to the jury instructions numbered 2, 3, 6, 7, 8 and 9, respectively. 3. That the court erred in refusing prayers of appellant numbered 2, 3, 4, 5, 6 and 8, respectively. 4. That the court erred in modifying, and giving as modified, prayer

1. See notes and abstracts of Arkansas and other cases covering the points decided in the case at bar, reported at end of this case.

number 2 asked by appellant. 5. That the verdict is excessive, and not sustained by the evidence.

The case of *Railway Co. v. Roberts*, 56 Ark. 387, is the fruit of the same accident here in controversy; and, in that case, the proof, except as to the person injured, and as to the nature and extent of the injuries, was the same as in this case. Lewis, appellee, as the result of the catastrophe, was seriously shaken up and painfully jolted, which probably caused a separation of the fibres of the lower abdominal wall, allowing a portion of the intestines to protrude in such a manner as enabled a medical witness to classify the injury as reducible hernia.

Bound north and towards a crossing, Lewis and a companion, in a wagon drawn by a team of mules, were traveling upon a public highway, which, for about six hundred yards, ran on the west of, near, and parallel to appellant's railway. On the opposite side of the highway from the railway was a farm fence, extending some distance along and near the road, and north of the crossing. When the travelers had reached a point about 200 yards distant on the highway, there appeared, bound north, on the railway, "a fast freight" train, making about twenty-five or thirty miles an hour. The whistle was sounded for the depot, which is 640 yards south of the crossing, but the train did not stop or check its speed. Some 200 yards north of the depot, at or near "a whistling post," which was about 400 yards from the crossing, the whistle was again sounded, in four successive and rapid blasts, as a signal for the crossing, and thence continuously sounded until the crossing was reached. There was evidence that when the whistle was first sounded the train was about fifty yards south of the depot, at which sound appellee's team became frightened; that the train came on with whistle sounding, and emitting steam from the steam cocks on the side of the engine next to the highway; that the sound increased the fright of the team, which, in plain view of persons on the engine, had got beyond the control of the driver, and were running; that the whistling and emissions of steam from the steam cocks were continued until the crossing was reached. There was evidence that when the engine reached the "whistling post," the team was in plain view, frightened and running, and that they continued to run until they reached the crossing, where, although appellee was endeavoring to avoid injury, the team rushed upon the crossing, where the engine struck the wagon, and appellee received his

injuries. There was evidence also, that, at about the time the engine reached the crossing, the whistle was sounded for brakes, the engine reversed, and the train brought to a standstill some 200 or 300 yards north of the crossing, whilst there was verbal evidence that such a train could not be stopped in a distance less than 600 yards.

By instruction numbered 9, we think the measure of damages correctly given to the jury, and, from the evidence as to the nature of the injury and the resultant suffering, we are not prepared to say that the verdict is excessive.

In the case of *Railway Co. v. Roberts*, 56 Ark. 387, this court said: "Whether the injury complained of resulted from negligence upon the part of the defendant was, under the circumstances of the case, a question for the jury. The evidence is sufficient to sustain the verdict." The term "negligence" is relative, and its application depends upon the situation of the parties, and the degree of care and vigilance which the circumstances confronting them reasonably impose. Mr. Cooley, in his work on *Torts* (2d ed.), p. 752, admirably defines "negligence." He there says that it is "the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

Appellant's second, third and fourth assignments of error relate to instructions given and refused.

Instructions given and numbered 2, 3, 6, 7 and 8, respectively, are the same as instructions given in *Railway Co. v. Roberts*, 56 Ark. 387, numbered respectively 2, 3, 10, 11, 12; and there these instructions, if not all approved, were held not to be unfavorable to appellant; and we think that other instructions asked by appellant and refused were covered by instructions given by the court.

Prayer number 2, asked by appellant, but refused as asked, is as follows: "If the jury find from the evidence that the engineer of defendant's train was, at the time of the accident, on the lookout, and saw the plaintiff's team just before and as he started to cross the track, and immediately used every effort in his power to control and check his train, but failed because of the nearness of his train to the team, the court instructs you that there was no negligence on the part of the engineer, and you will find for the defendant on this point." The court, however, modified the

prayer as follows: "Unless you further find that the accident and injury were directly occasioned by the negligence of the engineer in blowing off his steam, and thereby carelessly causing the team to run away;" and gave the instruction as so modified. The instruction as asked was not proper. It took away from the jury the question whether, under the facts presented, the engineer was negligent in blowing off steam, and, if so, whether such negligence was the proximate cause of appellee's injuries. The instruction, as modified and given, was correct. *Norton v. Eastern R. Co.*, 113 Mass. 366; *Lamb v. Old Colony Railroad*, 140 Mass. 79; *Petersburg R. Co. v. Hite*, 81 Va. 767. *Lamb v. Old Colony Railroad*, *supra*, was a case where a horse was frightened, and injury resulted from the firing up of an engine at a particular place; and the court there said that "the act of firing up, like that of sounding a whistle or blowing off steam, is one necessarily incident to the running of trains, not continuous, but occasional, and so to some extent capable of being regulated in its use; and it may be negligence to do it in places where there are likely to be persons who may be endangered by it, and where its use can be avoided, as at stations and at highway crossings and short portions of the railway near a highway."

Our statute, it is true, requires certain signals to be made upon the approach to a crossing, as a warning that persons may not come unawares into danger. This requirement of the statute ought not to be, and we think cannot be, held to be so inflexible as, under special circumstances, to contribute to or produce the injury which it is designed to prevent. It is the duty of the engineer to make these signals, and he may presume primarily that teams on near and parallel highways will not take fright at them, and that they will be heeded by persons approaching the crossings; but he must make the signal in a prudent and careful manner, out of regard for the public safety. If it be apparent that a team on such highway has become frightened at the sound of the signals, and is endangering the safety of an individual, the engineer should change, suspend or stop the sound of the signal, as the circumstances seem reasonably to require, until the team be passed or the danger averted; and if it then appear that, for any cause, a person at the crossing or approaching it on the highway is heedless of, or unable to escape, danger by collision, the engineer, if he can, by the ordinary means at his command, should check or stop his train, as prudence may require; and

whether he exercised such ordinary care or prudence in this case was a question for the jury.

Counsel for appellant press another point upon our attention. It is insisted that there was no testimony by any witness that the blowing off of steam at the steam cocks was not, under the circumstances, necessary for the ordinary operation of the train. "It was not," say counsel in argument, "a question about which one witness had testified that it was unnecessary, and another had testified that it was not, and that, therefore, negligence cannot be imputed." If the jury are to be judges of the question as to whether there was negligence or a want of reasonable care and prudence, what will constitute the one or the other will depend upon the particular circumstances of each case. *Hahn v. R'y*, 51 Cal. 607; *McCully v. Clarke*, 40 Pa. St. 399, 80 Am. Dec. 584; 1 *Thomp. Neg.*, 417; *Sawyer v. Eastern S. Co.*, 46 Me. 400, 74 Am. Dec. 463.

The place, the length and character of the train, its rate of speed, the view, whether plain or obstructed, the fright of the team, its conduct and distance from the crossing, and the distance of the train from the team and the crossing, the purpose and use of steam cocks, the manner and facility of their manipulation, and all other circumstances, may be considered by the jury, in the light of common knowledge, experience and observation. There was evidence in this case to warrant the jury, in the light of common observation and experience touching steam machinery of the kind mentioned in the evidence, in saying, as they probably did, that the continuous blowing off of steam after the engine came into plain view of the frightened and running team was not necessary, but imprudent and careless. 1 *Thomp. Neg.*, 351; *Brown v. Griffin*, 71 Tex. 654, 9 S. W. 546; *Davis v. Winslow*, 51 Me. 291, 81 Am. Dec. 573.

The court gave an instruction favorable to the appellant, which was to the effect that if the team was frightened only at the statutory signals, made in an ordinarily careful manner, and injury resulted, no liability attached; but that it was the duty of engineers in charge of trains approaching crossings, or when running near and alongside of a public highway, to use ordinary care to discover travelers on such highway, and to so manage such trains as not carelessly or negligently to injure such travelers. We think this is substantially correct. *Louisville, etc., R'y v.*

Stanger, 32 N. E. 209; *Rosenberger v. Grand Trunk R'y Co.*, 15 Am. & Eng. R'y Cas. 448.

The engineer is not expected to neglect his other necessary and important duties. His position is one of great importance, his duties to passengers and property exacting, and great interests — life and property — depend upon their proper discharge; but persons on public highways running near and parallel to the railway and crossing the railway, while acting prudently and carefully themselves, have the right to expect ordinary care and prudence of the engineers operating these dangerous elements. *Hill v. Portland R'y*, 55 Me. 438; *Pittsburg, etc., R. Co. v. Gilleland*, 56 Pa. St. 450.

On the whole, we see no error to the prejudice of appellant; and, as we cannot say from the testimony, that the verdict is excessive, the judgment of the lower court is affirmed.

BUNN, CH. J.. and WOOD, J., dissented. RIDDICK, J., disqualified.

NEGLIGENCE — STANDARD OF CONDUCT — INSTRUCTIONS AS TO. — In the case of *St. Louis, I. M. & S. R. Co. v. Spearman*, 64 Ark. 332, 336, 3 Am. Neg. Rep. 516, 518, the trial court instructed the jury, in part, as follows: "You fix the standard for reasonable, prudent and cautious men, under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard; and neither the judge who tried the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on the subject." On review, the Supreme Court said, regarding this instruction: "In the opinion of the court, this is obnoxious to criticism. The law fixes the standard for the conduct of reasonable, prudent and cautious men, under the circumstances of a case of this kind; and it is the duty of the court to instruct the jury as to the law, and the duty of the jury to regard the instructions of the court, and take them as the law of the case. Were it otherwise, every jury would be at liberty to fix its own standard of negligence or ordinary care, without regard to the instruction of the court as to what might be diligence or negligence. If this part of the instruction were correct, under the construction that might be placed upon it, it would be idle for the court to tell the jury that, in approaching a crossing over a railroad track, ordinary prudence requires that a traveler intending to cross the track should use his

senses, that he should look and listen for the approach of an engine, and that a railway track is a constant reminder of danger, etc., which the courts are constantly doing, and which the law requires they shall do in proper cases. As given it is ambiguous and liable to be misunderstood. We are persuaded that the learned judge who gave it did not intend it to have the construction which seems to us the reasonable one to put upon it. If the court mean that, the facts being proven, and the law having been given by the court, it was the province of the jury to determine the question of negligence or contributory negligence for themselves, this would have been correct. We think this is what the court meant. We are aware that an instruction in the same language was approved by the Supreme Court of the United States, in the connection in which it was given in the case of *Railway Co. v. Ives*, 144 U. S. 408. But we think the circumstances of that case were different from the circumstances here."

LOOKOUT — DUTY TO KEEP. — It is the duty of an engineer to keep a constant lookout to avoid injury or damage. *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562.

The statute of Arkansas (Sand. & H. Dig., § 6207), in actions for injuries at crossings, places the burden upon the railroad company to show that a proper lookout was kept. *St. Louis, I. M. & S. R. Co. v. Denty*, 63 Ark. 177, 184. In this case the court say: "The train was passing at a high rate of speed over a crossing in a village, and ordinary care required that the fireman or some other employee should have kept a lookout along the track, so that the persons about to approach the track from that side could be seen. *St. Louis S. W. R. Co. v. Russell*, 62 Ark. 182; *St. Louis, I. M. & S. R. Co. v. Lewis*, 60 Ark. 409, 416." In the case of *St. Louis S. W. R. Co. v. Russell*, 62 Ark. 182, 185, the court say: "Under the statute (Sand. & H. Dig., § 6207), it is the duty of railroads to keep a *constant* lookout for persons and property on the track. Before the passage of this act, it was not negligence for railways to fail to keep a lookout for persons on their tracks, and from the time of the decision of *Memphis & L. R. R. Co. v. Kerr*, 52 Ark. 162, in May, 1889, to the passage of the act of April 8, 1891, it was not negligence for railroads to [fail to] keep a lookout. * * * By the act (1891) the duty of keeping a *constant* lookout was enjoined as to both persons and property, upon their tracks, and a failure to perform that duty, resulting in injury to another, is negligence."

But the failure of the company to keep the constant lookout required by the statute will not excuse an adult person who carelessly sits or stands upon a railway track and allows a train to strike

him. Under such circumstances the contributory negligence of the person injured bars recovery. *St. Louis, I. M. & S. R. Co. v. Denty*, 63 Ark. 177, 185.

In the case of a child of such tender years as not to possess sufficient discretion to be adjudged guilty of negligence, the rule is different, and the failure to keep the required lookout is such negligence as will require the company to respond in damages. *St. Louis, I. M. & S. R. Co. v. Denty*, 63 Ark. 177, 185; *St. Louis S. W. R. Co. v. Dingman*, 62 Ark. 253.

CULPABLE NEGLIGENCE is the omission to do something which a reasonable, prudent and honest man would do under the circumstances, or the doing of something which such a man would not do, under all the circumstances surrounding the particular case. *St. Louis, I. M. & S. R. Co. v. Vincent*, 36 Ark. 451. See *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336; *Little Rock & Ft. S. R. Co. v. Jones*, 41 Ark. 157, 160; *Hot Springs R. Co. v. Newman*, 36 Ark. 607.

UNAVOIDABLE ACCIDENT. — Under the Arkansas statute, a railroad company is not liable for an unavoidable accident. *Little Rock & Ft. S. R. Co. v. Jones*, 41 Ark. 157. See *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336; *Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; *City Electric St. R. Co. v. Conery*, 61 Ark. 381, 387; *Ugla v. West End St. R. Co.*, 160 Mass. 351; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203.

DUTY OF TRAVELER TO LOOK AND LISTEN. — It is the duty of a person on coming to a railroad crossing to look and listen for approaching trains, and when, by the due exercise of care in this respect, the danger could have been discovered and the injury avoided, no recovery can be had. *Little Rock & Ft. S. R. Co. v. Blewitt*, 65 Ark. 235, 238-9; *Martin v. Little Rock & Ft. S. R. Co.*, 62 Ark. 156; *St. Louis, I. M. & S. R. Co. v. Tippet*, 56 Ark. 457; *Little Rock & Ft. S. R. Co. v. Cullen*, 54 Ark. 431; *St. Louis, I. M. & S. R. Co. v. Amos*, 54 Ark. 159.

In the case of *Martin v. Little Rock & Ft. S. R. Co.*, 62 Ark. 156, 159, the court say: "We do not hold that in every case when a traveler fails to look and listen, and is injured by a train while crossing a railway track, the case should be taken from the jury. It is only where it appears from the evidence that he might have seen, had he looked, or might have heard, had he listened, that his failure to look and listen will necessarily constitute negligence. *Smedis v. Brooklyn & R. B. R. Co.*, 88 N. Y. 13; 2 *Wood on Railw.* 1527. Then, too, there are cases where the employees in charge of the train fail to use due care after discovering the danger to the traveler."

CONTRIBUTORY NEGLIGENCE — WHEN INJURY EXCUSES. — The general rule is that one who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury, where he by his own or his agent's ordinary negligence or wilful wrong contributed to produce the injury of which he complains, to such an extent but that for his concurring or co-operating negligence or fault the injury would not have happened to him. To this general rule there is an exception in those cases where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence. *Little Rock & Ft. S. R. Co. v. Parkhurst*, 36 Ark. 371, 377. See *Citizens' St. R. Co. v. Steen*, 42 Ark. 321; *St. Louis, I. M. & S. R. Co. v. Hecht*, 38 Ark. 357, 369; *St. Louis, I. M. & S. R. Co. v. Tippet*, 56 Ark. 457; *Little Rock & Ft. S. R. Co. v. Cullen*, 54 Ark. 431; *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Harvey v. Rose*, 26 Ark. 3. See also *Brand v. Schenectady & T. R. Co.*, 8 Barb. (N. Y.) 368; *Johnson v. Boston & M. R. Co.*, 125 Mass. 75; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475.

ESCAPING STEAM — FRIGHTENING TEAM — INJURY AT CROSSING. — In *Railway Co. v. Roberts*, 56 Ark. 387, it is held that where the employees of a railway negligently permit steam to escape in such a manner as to frighten a team of horses which runs away, and there is a collision at the crossing, the company will be liable for the damages. The court say: "All the evidence shows that the proximate cause of the injury was the frightening of the team. *Billman v. Railway Co.*, 76 Ind. 166. If that was due to the company's negligence, it was liable for all the consequences resulting directly from it; otherwise it was liable for none of them. The deceased was not injured in driving or attempting to drive over the crossing. He was carried there involuntarily by the frightened team, and the defendant was not responsible for his being there if its negligence was not the cause of the fright to the team. The question as to the company's liability would not be changed if it were shown that the condition of the crossing was perfect, and that the deceased would have been carried safely over it but for a defect in the wagon. The condition of the crossing was not, therefore, material to the issue."

In the case of *St. Louis, I. M. & S. R. Co. v. Lewis*, 60 Ark. 409, 415, the court hold that the question whether there was negligence or a want of reasonable care and prudence depends upon the particular

circumstances of each case, citing *Hahn v. So. Pac. R. Co.*, 51 Cal. 605, 607 ; *McCully v. Clarke*, 40 Pa. St. 399, 80 Am. Dec. 584 ; *Sawyer v. Eastern Steamboat Co.*, 46 Me. 400, 74 Am. Dec. 463. The court say: "There was evidence in this case to warrant the jury, in the light of common observation and experience touching steam machinery of the kind mentioned in the evidence, in saying, as they probably did, that the continuous blowing off of steam after the engine came into plain view of the frightened and running team was not necessary, but imprudent and careless. *Brown v. Griffin*, 71 Tex. 654 ; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573."

TOMPKINS V. CLAY STREET RAILROAD COMPANY.

Supreme Court, California, November Term, 1884.

[Reported in 66 Cal. 163.]

COLLISION BETWEEN STREET CARS — JOINT TORT FEASORS — PASSENGER INJURED. — Where a passenger on a street car is injured by a collision with another car resulting from the mutual negligence of the parties in charge of each car, the party injured may recover from the proprietors of either or both. Where both parties are sued, the plaintiff may dismiss as to either, and if it turn out at the trial that one of the parties was not guilty of negligence, plaintiff may, on sufficient evidence, take a verdict against the other (1).

PRESUMPTION OF NEGLIGENCE. — In an action against two carriers for damages caused by a collision between street cars in which a passenger on one of the cars was injured, it was *held* that the mere circumstance that plaintiff had been injured as a result of the collision did not create a presumption of negligence against the carrier on whose car plaintiff was not a passenger.

RELEASE OF JOINT TORT FEASOR. — In an action against two carriers for injuries sustained in a collision, a release of one of the carriers, in consideration of compensation paid to the plaintiff for the alleged injuries sustained, operates as a release of both carriers.

APPEAL by the Clay Street Railroad Company from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial. The facts appear in the opinion. *Judgment reversed.*

1. *Joint negligence of two street-railroad companies.* — In connection with the point decided in the case at bar, see *Kuttner v. Lindell R. Co.*, 29 Mo. App. 502; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Goorin v. Allegheny Traction Co.*, 179 Pa. St. 327, 333, 1 Am. Neg. Rep. 178; *West Chicago St. R. Co. v. Piper* (Ill.), 1 Am. Neg. Rep. 406; *Taylor v. Grand Ave. R. Co.* (Mo.), 1 Am. Neg. Rep. 469.

ESTEE & BOALT, for appellant.

GARBER & THORNTON, and F. A. BERLIN, for respondent.

McKinstry, J. — A car of the Clay Street Hill Company collided with a car of the Sutter Street Railroad Company, at the crossing of Clay and Polk streets, San Francisco. Plaintiff, a passenger in the car of the latter company, was thrown from her seat and injured. The complaint charges neglect on the part of both companies. Plaintiff recovered damages of the Clay street company, and the appeal is by that company.

In Pennsylvania it seems to have been held that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury. *Lockhart v. Lichtenhaler*, 10 Wright, 151; *Phila. and Reading R. R. Co. v. Boyer*, 97 Pa. St. 100. But the weight of authority is otherwise, and is to the effect that, if the negligence of the managers of both vehicles contributes to the injury, the party injured may recover from the proprietors of either or both. *Wharton*, Neg. 395, and cases cited. Where both are sued, the plaintiff may ordinarily dismiss as to either; and, if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other.

The court below charged the jury: "In civil cases (and this is a civil case), the affirmative of the issue must be proved; and when the evidence is contradictory, your decision must be made according to the preponderance of the evidence." But the court refused to charge, at the request of defendant, the Clay Street Hill Railroad Company: "If you find from the evidence that the plaintiff was a passenger on the street car of the defendant, the Sutter Street Railroad Company, then I instruct you that no presumption of negligence, as against the Clay Street Hill Railroad Company, arises from the fact of the injury, and that the plaintiff must show, by a preponderance of the testimony, that the defendant, the Clay Street Railroad Company, was guilty of negligence."

The appellant was entitled to have the attention of the jury called to the point, that, in considering the evidence, the mere circumstance that plaintiff had been injured as a result of the collision did not create a presumption of negligence on appellant's part. The general charge, to the effect that the plaintiff must make out her own case by a preponderance of evidence, was not the equivalent of the specific instruction requested.

The defendant, the Clay Street Railroad Company, also asked the court to charge:

“ 2. You are instructed that if you find from the evidence that the plaintiff has received from the Sutter Street Railroad Company, one of the defendants in this action, compensation for the injuries alleged in the complaint, your verdict must be for the defendant.

“ 3. The Sutter Street Railroad Company is joined as a defendant in this action with the Clay Street Hill Railroad Company. The plaintiff, by her complaint, alleges a joint injury, and asks for a joint judgment against the two defendants. The defendant, Clay Street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter Street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant, Sutter Street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant, the Sutter Street Railroad Company, from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant, the Clay Street Hill Railroad Company.”

To the refusal to give the instructions asked, the said defendant excepted.

If both defendants were guilty of negligence, it seems to be conceded by respondent, the requested instructions, or one of them, properly declared the law; and such was the view of the court below. The learned judge charged the jury:

“ If you find from the evidence that both defendants are jointly in fault for the plaintiff's injuries, you will find a verdict for the defendant, because the payment by the Sutter Street Railroad Company operates as a release to both defendants. If, however, you find that only the Clay Street Hill Railroad Company was in fault, you will find a verdict for the plaintiff against that defendant, and assess the damages.

“ You are instructed that, if you find, from the evidence, that the plaintiff has received from the Sutter Street Railroad Company, one of the defendants in this action, compensation for the injuries alleged in the complaint, your verdict must be for the defendants, unless you find that the defendant who paid the money was innocent of fault as to the tort.”

Every party contributing to the injuries of plaintiff was liable to

the full extent of the damages by her sustained. Her injuries gave her but a single cause of action. If she had brought a separate action against the Sutter street company, and recovered a judgment therein, and such judgment had been satisfied, she could not subsequently have maintained another action for the same injuries against the Clay street company, inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained. Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant.

And so, if her damages resulted directly from the negligence of both defendants, and plaintiff received from the Sutter street company compensation for her injuries, and released that company, she ought not to have recovered a judgment against the Clay street company. As was said in *Urton v. Price*, 57 Cal. 272, 7 Pac. C. L. J. 82: "It is to be observed, when the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent." And Judge Cooley, from whose book on the Law of Torts the foregoing observation is taken, adds: "Therefore, if he receives the satisfaction voluntarily made by one, that is a bar as to all." (P. 139.)

It is urged by counsel for appellee that the rule only applies where the money is paid by, or the release executed to, one who is himself actually guilty of the wrong or negligence. If it be conceded that a release to, or receipt of money in alleged satisfaction from one not himself a trespasser, will not discharge those actually guilty, the question still remains: Can the plaintiff, under the circumstances, be permitted to deny that the Sutter Street Railroad Company was guilty of negligence directly contributing to the injuries by her received? Reading the release and stipulation in the record, it is plain the \$550 was paid in settlement of the action pending, in so far as the cause of action alleged constituted a claim against the Sutter street company.

The compromise of an asserted claim does not necessarily involve an admission on the part of him against whom the claim is asserted, that the claim is well founded. But one who, having

commenced an action against another, has received money in consideration that the action shall be dismissed, or that any judgment he may recover shall not be enforced, ought not to be permitted to deny that he received the money in satisfaction of a valid demand. The defendant paying the money may subsequently say: "I did not, and do not, admit that I ought to have paid anything; I was willing to buy my peace." But the other party ought not to be allowed to deny that he had any right to the money, the payment of which he had induced under pain of the prosecution of an action already commenced. He should not be permitted to say with any beneficial result to himself, "I pursued the defendant *falso clamore*, and I took his money by way of settlement of a pending action in which I never could have recovered." Shall it be said that plaintiff has not received compensation for the injuries she sustained, because she did not choose affirmatively to prove that the negligence of the party from whom she received the money contributed to the injuries?

The plaintiff must be held to have received from the Sutter street company satisfaction for the very same injuries for which she obtained a judgment against the appellant.

In *Turner v. Hitchcock*, 20 Iowa, 314, the notice by the plaintiff to one of the defendants was not a technical release, and there was no evidence that it was given upon or for a consideration. It was at most a mere promise, without consideration, not to prosecute the action against the particular defendant, so that if he had been admittedly a co-trespasser with the other defendants, the notice would not have released the others. It has been well settled that a covenant not to sue is not such a *release* as will discharge the co-trespassers. The remark of the learned judge, "nor do we think, as argued by appellee, that plaintiff having sued Johnson as a joint trespasser, was estopped, etc.," was not necessary to the decision; and while the suggestion may have been made by counsel for appellee in oral argument, the whole question as to a discharge of defendants by reason of the notice seems not to have been considered worthy of a place in their *points*, as printed in the report of the case. Under the circumstances, we think the remark referred to is not to be accorded the weight of a deliberate judgment upon the question involved in a legal controversy.

Judgment and order reversed, and cause remanded for a new trial.

McKEE and ROSS, JJ., concurred

DRISCOLL, ADM'X V. MARKET STREET CABLE RAILWAY COMPANY.

Supreme Court, California, March Term, 1893.

[Reported in 97 Cal. 553.]

DUTY OF STREET RAILROAD COMPANIES—PEDESTRIANS CROSSING TRACK. — Street railroad companies are held to due care in the management of their lines, and when exercising such care, are not responsible in damages to a person who, in a careless or reckless or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a street car, with a clear track before him, has a right to assume that people will not suddenly undertake to cross in front of it.

PEDESTRIAN KILLED AT STREET CROSSING — FAILURE OF STREET CAR COMPANY TO RING BELL — ORDINANCE. — Where plaintiff's intestate was struck and killed by a street car at a street crossing, the failure of the person in charge of the car to keep the bell ringing or the gong sounding, from a point twenty-five feet from a street crossing until the crossing shall have been passed, as required by a city ordinance, was negligence, because it was in violation of a reasonable ordinance, and also because the omission was, in itself, under the circumstances, careless (1).

1. *Traveler not excused from duty of looking and listening before crossing railroad track by misconduct of railway company.* — In *Grostick v. Railroad Co.*, 90 Mich. 594, it was held "that a person about to cross a railroad track is bound to recognize the danger, and to make use of the senses of hearing and sight, and to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk, and such conduct should be pronounced negligence by the court as matter of law." In that case the declaration alleged, and the plaintiff's evidence tended to show, that the defendant was guilty of negligence in not continuously giving signals for forty rods before reaching the crossing, as the statute required.

In *Railroad Co. v. Righter*, 42 N. J. L., 180, the New Jersey court holds that the failure of the railroad company to

give signals will not relieve the traveler from his duty of looking and listening before crossing track.

In Pennsylvania a person is required to stop as well as to look and listen before crossing a railroad track, but this is not an invariable rule in other States, it being generally for the jury to determine from the facts whether plaintiff should have stopped as well as have looked and listened.

Street car track. — It was held in *Shea v. St. Paul City R. Co.*, 50 Minn. 395, collision between electric car and hack while plaintiff was driving across track at intersection of two streets, that the rule that one approaching a railroad crossing upon a highway must look up and down the track before he attempts to cross, is not applicable, as a hard and fast rule, to one who attempts to cross a street car track upon a public street. The failure to do so is not, as a matter of law, and without regard to circumstances, negligence.

CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — Where a street railroad company was in default for not giving the proper warning, as required by ordinance, the question whether a pedestrian who was struck and killed by a street car at a street crossing was guilty of contributory negligence was properly for the jury.

CARE REQUIRED OF PEDESTRIAN—CROSSING RAILROAD TRACK. — Ordinary care is all that is required of a person approaching and crossing railroad tracks, and ordinary care is that degree of care which people of ordinarily prudent habits could be reasonably expected to exercise under the circumstances of a given case.

APPEAL by the Market Street Cable Railway Company from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial. The facts are stated in the opinion. *Judgment affirmed.*

FRANK SHAY, for appellant.

FRANK SULLIVAN, for respondent.

McFarland, J. — On December 10, 1884, Alexander Driscoll was struck and killed by a car of defendant, at the intersection of McAllister and Larkin streets, in San Francisco; and his widow, as administratrix, brought this action to recover damages for his death. The jury returned a verdict for plaintiff in the sum of \$7,775, for which judgment was rendered. The defendant appeals from the judgment, and from an order denying a new trial. The only point urged by appellant is, that the evidence is insufficient to justify the verdict, the positions of appellant being that the evidence does not show that the accident was the result of any negligence of appellant, and *does* show that it was the result of the negligence of the deceased.

The question presented is certainly one of some difficulty. The rule is well established that this court will not disturb a verdict where there is a conflict of evidence on material points, and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial. When a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money from one party and giving it to the other without legal cause, the trial judge should, without hesitation, set the verdict aside; and in the event of his not doing so, this court will grant a new trial.

Street railroads are an established feature of modern city life. They are a convenience and a necessity to all classes of people, and are desired by all. But their operation on crowded streets

is necessarily attended with considerable danger to pedestrians — a danger which all people are bound to know, and against which they should protect themselves, by the use of at least reasonable caution. While, therefor, the owners of these railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless, or reckless, or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a car, with a clear track before him, has a right to assume that people will not suddenly undertake to cross in front of it; otherwise he could not make any headway, and no street-car line could be successfully operated, either for the profit of the owner or the convenience of the public. And the general rule is, that where the negligence of the injured party is a contributing proximate cause of the accident, he cannot recover damages. But whether or not his negligence did so contribute in any particular case is generally one around which conflicting evidence will be gathered; and in such case a railroad company which was itself guilty of negligence at the time of the accident cannot often expect to be relieved from an unfavorable verdict.

Section 501 of the Civil Code provides that the speed of a street car shall not exceed eight miles an hour; and an ordinance of the city and county of San Francisco provides (substantially) that every car shall have attached to it a bell or gong of sufficient size and weight to be distinctly heard, when rung or sounded at a distance of at least one hundred feet, and that the persons in charge of a car must keep the bell ringing, or the gong sounding, from a point twenty-five feet from a street crossing until the crossing shall have been passed.

In the case at bar the deceased, at the time the car struck him, was walking northerly along the easterly crossing of McAllister street where it intersects Larkin. On McAllister street the appellant has two parallel tracks, on the northerly of which the cars going west run, and on the southerly the cars going east. The deceased was struck by a car going west, on the northerly track; and, according to the custom of appellant, a car thus going comes to a standstill at a certain point called "Stop," which is thirty-seven feet east of the center of the said crossing. After starting again, it goes to a point called "Let Go," about five or six feet east of the crossing; and at the point "Let Go" the gripman

suddenly releases the grip from the cable, and the car runs across Larkin street from the impetus given by the cable, and without being attached to the latter. This is necessary because the cable is crossed by another cable running along Larkin street. The custom above stated was followed by the gripman of the car by which the deceased was killed. There was some evidence that the car, at the time of the accident, was running faster than eight miles an hour, though such evidence was exceedingly slight. It is admitted that the rate of speed at which the cable itself ran was only eight miles; but two of the witnesses testified that, after the car was released from the cable at the point "Let Go," it ran faster than the cable. The position of appellant, that it was physically impossible for the car, after it was detached from the cable, to have run faster than the cable, is hardly tenable; for there was a slight artificial down grade at that point for a few yards — one and seven-eighths inches from the "Let Go" to the center of Larkin street. But the testimony of the witnesses who swore to the increased speed was so unsatisfactory, and the increased speed itself so improbable, that a verdict founded on such speed alone, as constituting negligence on the part of appellant, could hardly be sustained. But it is clear that the employees of appellant in charge of the car failed to ring the bell as provided by said ordinance, and as due care required. There was a conflict of evidence as to whether or not the bell was rung at all until after the deceased was struck. Witnesses differed about it having been rung once just before or at the time the car started from the point "Stop," thirty-seven feet away; but the evidence is uncontradicted, and the fact is admitted, that the bell was not rung after leaving said point until after the deceased had been struck. This was clearly negligence, because it was in violation of a reasonable ordinance, and also because the omission was in itself, under the circumstances, careless. *Siemers v. Eisen*, 54 Cal. 418; *Higgins v. Deeney*, 78 Cal. 578; *Orcutt v. Pacific Coast R'y Co.*, 85 Cal. 291; *Shear. & R. Neg.*, § 13. It is true that failure to ring a bell, or to comply with some other statutory requirement, will not make a railroad company liable, if such failure is not the proximate cause of the accident, or if it was caused by the negligence of the injured party; and in the case at bar it is contended by appellant that it was the negligence of the deceased, and not the failure to ring the bell, that caused the injury. The contention is that, upon the evidence, we must

hold, as a matter of law, that the negligence of the deceased was the proximate cause of the injury; but, after a thorough examination of the record, we do not think that such contention can be maintained.

There is a conflict of evidence as to the actual conduct of the deceased, and the circumstances under which he acted, at the time of the accident. He was crossing McAllister street from the south side — going north. It is beyond dispute that about that time another car of appellant came down McAllister street, going east, and crossed said street on the south track, and stopped a few yards east of the crossing, although there is a conflict in the evidence as to the precise point which said car had reached when deceased started across the street. It was, however, clearly at a point where it was, to a greater or less extent (as it was further east or west), an obstruction to the observation of the deceased. The jury had warrant in the evidence to find that he started as soon as the east-bound car had passed the crossing; that the time was after daylight; and that the night was “dark and foggy,” although there was a headlight on the car. The two tracks are about four and one-half feet apart, and the deceased had nearly crossed the second or north track when the north side of the car struck him. One or two persons shouted to him to get out of the way, but it does not appear that he heard the warning. Under these circumstances, the appellant, being in default for not giving the proper warning, we think that the question whether deceased was guilty of contributory negligence was a proper one for the jury; that deceased cannot be held, as a matter of law, to have been so guilty; and that there was sufficient evidence to warrant the jury in finding that he was not. Counsel for appellant, in his very thorough and able brief, has cited a number of cases in which it was held that the plaintiff could not recover because he had not exercised sufficient caution in attempting to cross a railroad track. Those were cases, however, where the accidents occurred on ordinary steam railroads running through the country at comparatively long intervals of time; and the rule there laid down can hardly be applied in all its strictness to street railroads in crowded cities, where a car that can be speedily stopped passes a crossing every two or three minutes, and where people necessarily cross the streets frequently and hurriedly. *Shea v. Potrero, etc., R. R. Co.*, 44 Cal. 414; *Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 183; 1 *Thomp. Neg.*, p.

396, and cases there cited. Of course, if all people exercised the greatest care and caution in approaching and crossing railroad tracks, such accidents as the one here involved would rarely, if ever, occur; but the law does not expect or require such extreme care. Ordinary care is all that is required; and ordinary care is that degree of care which people of ordinarily prudent habits — “people in general” — could be reasonably expected to exercise under the circumstances of a given case. And considering all the evidence and circumstances in the case at bar, and particularly the fact that the deceased had a right to rely upon the usual and required signal of bell ringing when a car is approaching a crossing, we cannot say that the jury abused its power in holding that the deceased was not guilty of contributory negligence. The judgment of the learned judge of the court below, who heard all the evidence, and refused a new trial, is also entitled to great consideration. It is, no doubt, what is sometimes called a “close case;” but, in our opinion, there is no such absence of substantial evidence to support the verdict as would warrant us in setting it aside.

There is nothing in the point that the gripman could not have rung the bell because his hands were necessarily otherwise engaged. If it was not convenient for him to have performed that duty, the conductor should have done it; and it was no excuse that the conductor was temporarily absent from his post. Neither is there anything in the point that the ordinance requires, in terms, that the persons immediately in charge of the car, and not the company, shall give the warning. The judgment and order appealed from are affirmed.

FITZGERALD and DE HAVEN, JJ., concurred.

INTOXICATED PERSON LYING NEAR TRACK STRUCK BY TRAIN — RAILROAD COMPANY NOT LIABLE. — In **WILLIAMS v. SOUTHERN PACIFIC RAILROAD COMPANY** (*California, February, 1887*), 72 Cal. 120, judgment for plaintiff in the Superior Court of Monterey County was reversed, the case showing the following facts: On July 23, 1882, plaintiff was put off of one of the trains of the defendant at or near a place called Kelleher's Crossing. He then went a short distance away and procured a rope, with which he returned to the crossing and proceeded to tie up a bundle of blankets. Being very much intoxicated at the time and overcome by the heat, he fell asleep between the ties outside of the track, and so remained until he was injured by a passing train belonging to

the defendant. The action was brought to recover damages for the injury. On the trial the defendant moved for a nonsuit, which was denied. The Supreme Court (per TEMPLE, J.), in reviewing the evidence, said: "The plaintiff was lying beside, not on, the track. There were weeds where he was lying, but not sufficient to prevent his being seen. The plaintiff proved that such an object might have been seen in that position at a distance of four or five hundred yards by the engineer, if he had been looking for it. After the accident the plaintiff was picked up about fifteen feet from the crossing, and there was a clot of blood on the rail at the crossing. The whistle was sounded four hundred or five hundred feet from the place of the accident, and the engine was stopped right abreast of where the plaintiff was lying. It appears that the plaintiff, besides having his foot crushed, was injured somewhat on his head and one shoulder. Here the evidence on the part of plaintiff really ended. Plaintiff's own testimony was more favorable to the theory of the defendant. He thought he was sitting on the end of a tie outside the track. There is here no evidence whatever that the engineer saw plaintiff except the fact that the train was stopped, and no evidence of want of diligence. The engineer, however, testified for defendant that when he approached the place of the accident he first saw the bundle of blankets by the road, and kept his eye on it for about a half-minute before he saw the plaintiff; that as soon as he saw that the plaintiff was in a dangerous position, he used every effort, and as quickly as possible, to stop the train. There is no conflict as to what the engineer did, unless it consists in the fact that it is shown that he sounded the whistle, by doing which, it is claimed, he lost time in stopping the train. But we cannot now say that any time was lost by this, or that it was not proper under the circumstances, both as an alarm to plaintiff, whom the engineer did not know to be absolutely unjudging, and notice to the train hands to assist at the brakes. Then the engineer was not called upon for the highest possible diligence, but only for ordinary diligence; and even should it appear in judging afterwards that something different might perhaps have been better, it would not make the case against the defendant. We do not think there is here a substantial conflict, if it can be said that there is a conflict at all. The rule is not, as counsel seems to suppose, that any degree of conflict in the evidence, however slight, will avail to support a verdict and judgment on appeal. Where we can plainly see that the conflict is not a substantial one, we do not hesitate to interfere. Indeed, the testimony of the witnesses in the case discloses no conflict at all. The evidence which it is claimed tends to prove negligence on the part of the engineer consists simply

of inferences, which are uncertain and remote, and require considerable ingenuity on the part of counsel to make apparent. Admitting the general rule to be that the case will not be taken from the jury where there is any evidence tending to show negligence capable of producing any degree of uncertainty, we think even tested by that rule, a new trial ought to be granted in this case." Judgment reversed. THORNTON, J., dissented, but all the other judges concurred in judgment of reversal.

FLEMMING V. WESTERN PACIFIC RAILROAD COMPANY.

Supreme Court, California, October Term, 1874.

[Reported in 49 Cal. 253.]

COLLISION OF TRAIN WITH TEAM AND WAGON AT RAILROAD CROSSING — CONTRIBUTORY NEGLIGENCE.— In an action to recover damages for injuries to plaintiff's wagon and team through a collision with defendant's train while plaintiff was driving across the railroad track it was held that plaintiff was guilty of contributory negligence, precluding recovery, where it appeared that he was driving his four-horse team, when approaching a railroad crossing with which he was perfectly familiar, while the atmosphere was so filled with dust that he could not see the fences within a few feet of him, and attempted to cross the track without even stopping his team to listen for an approaching train (1).

APPEAL from judgment for plaintiff rendered in the District Court, Third Judicial District, County of Santa Clara. The facts are stated in the opinion. *Judgment reversed.*

S. W. SANDERSON, for appellant.

F. E. SPENCER, for respondent.

Crockett, J.— The action is for damages alleged to have been occasioned to the plaintiff's wagon and team through the negligence of the defendants' servants and agents. While crossing the defendants' railroad track, at a regular crossing, the wagon and team were struck by the engine of an approaching train, and three of the horses were killed and the wagon damaged. There was no contradiction in the evidence in chief as to certain prominent facts in the case. It was established by evidence in chief of this character: 1. That immediately preceding

1. See the Strong case, next reported distinguished on the question of contributory negligence.

the collision the plaintiff was driving his team of four horses, attached to the wagon, along the county road, which, for the distance of a mile, at that point, runs nearly parallel to the railroad track, and at no place within that space is distant from it more than two or three hundred yards, the distance growing gradually less as it approaches the crossing, at which point there are only a few feet between them. 2. That the plaintiff was driving along the county road, in the direction of the crossing, with the intention to cross the track at that point, and was perfectly familiar with the crossing, having passed over it on that morning and many times before. 3. That the county road at that point was then extremely dusty, and there was little or no wind blowing, in consequence of which the dust raised by passing vehicles was not soon drifted away, but remained for a considerable time before it settled or was dispersed. 4. That a short distance in front of the plaintiff, as he approached the crossing, and going in the same direction, were two other wagons and teams, which, together with his own, raised a cloud of dust which was so dense that he could not see the railroad track, nor even the fences along the county road, which were but a few feet distant. 5. That the plaintiff's horses were trotting until he approached within about twenty-five yards of the crossing, when he reduced them to a walk, and continued that gait until he got upon the crossing, at which point there was a sharp, shrill whistle from the approaching engine which was near at hand, and, his horses becoming frightened and unmanageable, were struck by the engine almost immediately after the whistle. 6. That while in motion, the plaintiff's wagon and team produced considerable noise, calculated to obstruct his hearing; that the plaintiff did not stop his team to listen whether a train was approaching, but did listen "purposely" for that object while the team was in motion, and heard nothing to indicate the approach of the train. 7. That for the distance of a mile before reaching the crossing there was nothing except the dust to hinder any one traveling the county road from seeing a train on the railroad. 8. That on that trip the train was somewhat behind the regular time for passing the crossing. The evidence on these points was wholly uncontradicted; but, as usual in such cases, there was considerable contrariety in the evidence on the question whether the engineer gave the proper or any signal as he approached the crossing. At the trial the defendant moved for a nonsuit, which was denied, and an exception

taken. A verdict and judgment having been rendered for the plaintiff, the defendant moved for a new trial, which was denied, and hence this appeal.

The motion for a nonsuit should have been granted. When the facts are admitted or established by uncontradicted evidence the question of negligence is a matter of law for the court. *Shearm. & Redf. Neg.*, § 11, and cases cited; *Pittsburgh & Conn. R. R. Co. v. McClurg*, 56 Pa. St. 294; 10 Am. Neg. Cas. 156; 57 Pa. St. 172; *Beisiegel v. N. Y. Cent. R. R. Co.*, 40 N. Y. 9.

In this case, on the plaintiff's own showing, he was guilty of contributory negligence, and is not entitled to recover, even though it be admitted that the defendant's employees also contributed to the loss, through their negligence. It is not easy to conceive of grosser negligence than that of a person driving a wagon with a four-horse team, when approaching a railroad crossing with which he is perfectly familiar, and which he intends to pass, while the atmosphere is so completely filled with dust that he cannot see the fences within a few feet of him, should attempt to cross without even stopping his team to listen for an approaching train. If his vision was so obscured by dust that he could not see a train within fifty feet of him, the most ordinary prudence would have suggested the necessity of stopping his team, that he might listen, under the most favorable circumstances, to ascertain whether a train was approaching. If the plaintiff had pursued this course, there can be no possible question that he would have escaped the collision. But the plaintiff testified that his wagon "made some noise," and every one knows that a four-horse team attached to a road-wagon traveling in a trot on an ordinary road will produce sufficient noise to seriously obstruct the hearing of the driver; and when going in a walk, though the noise may be less, it will necessarily be sufficient to impede the hearing to a considerable extent. As the plaintiff could not use his eyes with effect, it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do, while his team was in motion. Upon the plaintiff's statement of the facts, we hold that he was guilty of contributory negligence, in failing to stop his team to listen for an approaching train.

If the plaintiff's negligence contributed to the accident, as we hold it did, it is immaterial whether or not the defendant's agents

and servants were also guilty of negligence, in failing to give the proper signals or otherwise. Their failure to give the signals does not excuse the plaintiff for omitting the precaution which any person of ordinary prudence would have exercised under the circumstances. These views are supported by the following authorities and many others which it is unnecessary to refer to: *Shearm. & Redf. Negl.*, § 487 *et seq.*; *C. & R. I. R. Co. v. Still*, 19 Ill. 499, 509; *Dascomb v. Buffalo, etc., R. Co.*, 27 Barb. 227; *North Penn. R. Co. v. Heileman*, 49 Pa. St. 60; *Wilcox v. Rome, etc.*, 39 N. Y. 358; *Havens v. Erie R. Co.*, 41 N. Y. 296; *T. & W. R. R. Co. v. Goddard*, 25 Ind. 185; *Gordon v. Erie R. R. Co.*, 45 N. Y. 661; *Baker v. Savage*, 45 N. Y. 191.

Judgment reversed and cause remanded for a new trial.

STRONG v. SACRAMENTO AND PLACERVILLE RAILROAD COMPANY.⁽¹⁾

Supreme Court, California, August Term, 1882.

[Reported in 61 Cal. 326.]

DRIVING TOWARDS STREET RAILROAD CROSSING—IMPENDING COLLISION—HORSE FRIGHTENED—CONTRIBUTORY NEGLIGENCE.—In an action to recover damages for injuries sustained by plaintiff who was driving his horse at a slow trot towards defendant's railroad crossing on a street crossed by defendant's track, his horse taking fright on the approach of a train throwing plaintiff from the wagon, there was evidence that the street was built up on each side and lined with piles of lumber in such a manner as that a train upon the track could not be seen until plaintiff approached very near to the track. *Held*, that the evidence did not justify a nonsuit on the ground of contributory negligence.

Distinguishing *Flemming's Case*, 49 Cal. 253 (11 Am. Neg. Cas. 193, *ante*), where the track was ordinarily visible, but some transitory obstacle impeded the plaintiff's vision—as clouds of dust—in that case.

APPEAL from a judgment for plaintiff, and from an order refusing a new trial in the Superior Court of Sacramento County. The facts appear in the opinion. *Judgment affirmed.*

T. B. MCFARLAND, for appellant.

GEORGE CADWALADER, P. J. HOPPER, and R. T. DEVLIN, for respondent.

1. See the *Flemming* case, preceding contributory negligence in driving across case reported, on the question of con- railroad track.

McKinstry, J. — There was certainly a very substantial conflict in the evidence with reference to negligence on the part of the defendant, and the court below denied a motion for a new trial.

The question whether plaintiff was so plainly guilty of contributory negligence as that the court below should have granted a nonsuit, or new trial, is to be determined — as such questions must always be determined — by the particular circumstances of the case. Plaintiff had a right to drive upon “ M ” street, and to cross the track at the foot of that street, provided he adopted every reasonable precaution against injury from moving trains. There was evidence that “ M ” street was built up on each side, and lined with piles of lumber, in such a manner as that a train upon the mill track could not be *seen* until plaintiff approached very near to the track. What should he have done to avoid the imputation of negligence? The engine bell was not rung as required by section 486 of the Civil Code. This must be assumed in this court, because there was testimony to that effect. Nor can it be presumed, as against the verdict, that the noise of plaintiff’s wagon, as his horses were proceeding upon “ a slow trot,” would have prevented his hearing the bell, had the bell been rung. Plaintiff had a right to rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching a crossing. In the legal sense, he was innocent of negligence, unless there was a want of ordinary care and prudence on his part. The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but, if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover. *Robinson v. W. P. R. R. Co.*, 48 Cal. 423.

A very timid or cautious person would not, perhaps, have driven in the direction of the railroad, knowing that a train *might* pass along the track, and that the warning bell might not be sounded. But the question is: Did the plaintiff exercise ordinary care and prudence in doing what he did? The degree of caution required is relative to the risk; but no person is bound to assume that another will abandon any reasonable precaution, or violate the obligation imposed upon him by the laws of the land. Plaintiff was authorized to assume that all other persons using the street would do so with due care. It cannot be imputed as

negligence that he did not anticipate culpable negligence on the part of the employees of defendant. (Shear. & Redf. on Negl., § 31.) He had a right to assume, until he reached a point where he could look up and down the track, that no train was approaching the crossing, because there was no sound of an engine-bell. He would have had no right to close his eyes, had he been in a position to see the track; but, as already stated, the evidence shows that he could not look up and down the track, because of the intervening buildings and lumber, until he reached a point very near it. Had he been where the track was ordinarily visible, but some transitory obstacle impeded his vision — as the clouds of dust in *Flemming's Case*, 49 Cal. 253 — it might have been his duty to wait until the obstacle was removed (1). But here plaintiff's view was cut off by permanent erections; he certainly had the right to use the street. We cannot say that it was his duty to stop, fasten his team at some point considerably distant from the track, and from thence make a *reconnaissance* of the situation *afoot*. Whether plaintiff was properly cautious after he reached a place from which he could see the track was a question of fact as to which we cannot say the jury found wrongly.

Of course, our conclusion assumes the fact to have been as testified to by plaintiff and his witnesses, since the only point to be considered here is whether the question of contributory negligence should have been taken away from the jury or a new trial granted.

Appellant argues that the jury disobeyed the eleventh instruction given at the request of defendant's counsel. The verdict does not prove this, because the jury may have found that plaintiff could not have heard the approach of a locomotive or train had his horses been walking.

The general statement in the fifth instruction asked for by defendant's counsel is taken from Shear. & Redf. on Negl., § 481. Separated from the context, however, it might have misled the jury, and the court below was justified in refusing it. As offered, it might have been applied to the question of negligence on the part of *defendant*. If there is imminent danger of collision, which might be avoided by stopping or slowing a train, the engineer cannot justify himself in driving his engine upon a wagon and horses, under the plea that the driver should have kept out of the way. The case shows no *contest* for the right of

1. See the preceding case reported.

way. The jury had been told in effect that if plaintiff could have heard the locomotive in time to avoid the consequences which followed, he was guilty of contributory negligence. This charge was more strongly in favor of defendant than if they had been told that he should give way to the locomotive after he saw or heard it.

The sixth instruction asked by defendant was to the effect that plaintiff could not recover if his horses were frightened by the appearance of the locomotive, or the ordinary sound of its passage. The instruction ignores the other circumstances of the case. We cannot say that the plaintiff ought not to have recovered if, by reason of the carelessness of the engine-driver and without any want of prudent care on his own part, he found himself in such close proximity to the locomotive as that his team, composed of horses ordinarily well broken, and of ordinary gentleness, were startled, frightened and ran. All the circumstances were to be considered by the jury. The seventh instruction goes to the extent of declaring that plaintiff ought not to recover unless the locomotive, or some part of the train, came into actual contact with the horses or vehicle. This proposition cannot be successfully maintained.

Hasket v. Peru & Ind. R. R. Co., 10 Ind. 409, cited by appellant, was a case in which it was held, that, under a *statute*, which provided for the recovery of the value of any animal killed or injured "by the cars, or locomotive, or other carriages" used as a railroad, no recovery could be had unless the animal was struck by a car, locomotive, or carriage; the court saying the words of the *statute*, in their ordinary import, involved an actual collision. In *Burton v. R. R. Co.*, 4 Harr. 252, also cited by appellant, it was only said that plaintiff could not recover unless defendant was guilty of negligence. The *head-note* should be read in connection with the statement of facts and opinion. In the case before us the evidence certainly *tended* to prove that the injury was the direct result of the omission to ring the bell as required by the statute.

We can see no contradiction between instruction seven, given at the request of plaintiff, and instruction seven, given at the request of defendant. Nor is there any substantial contradiction between No. 7, given for plaintiff, and No. 11, given for defendant.

The court did not err in overruling the demurrer to the amended complaint.

Judgment and order affirmed.

MYRICK, J., concurred. MCKEE, J., concurred in the judgment.

Hearing in Bank denied.

PEPPER V. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, January Term, 1895

[Reported in 105 Cal. 389.]

DRIVING ACROSS TRACK — OBSTRUCTION OF VIEW — FAILURE TO STOP, LOOK AND LISTEN — SPEED OF TRAIN — CONTRIBUTORY NEGLIGENCE. — Where plaintiff's intestate was struck and killed by defendant's train at a railroad crossing, the fact that his view was obstructed, after he crossed a thoroughfare leading thereto, made it negligence on his part to drive at a rate of speed which not only interfered with his hearing an approaching train, but made it difficult or impossible to stop; as ordinary care for his own safety required him to stop in order that his hearing should not also be obstructed, and in any event to make his approach so slowly as to give him complete control of his team, and enable him to stop instantly if occasion required. Nor did the fact that the train was running at rate of speed faster than usual, and that the train was late, excuse the negligence of the deceased to take proper precautions in approaching the track.

ACCIDENT AT RAILROAD CROSSING — CONTRIBUTORY NEGLIGENCE. — Where a person's negligence contributed proximately to the accident resulting in his death, the plaintiff cannot recover, even though the defendant negligently omitted to give warning of the approach of its train at a railroad crossing which the law and its duty required.

DEATH OF RELATIVE — MEASURE OF DAMAGES — ERRONEOUS INSTRUCTION. — An instruction, in an action by a father for damages for death of a son, that the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, but the jury may also take into consideration the loss, if any, sustained in being deprived of the comfort, society and protection of his son by reason of his death, is erroneous, as the damages in such an action must be confined to the pecuniary loss suffered by the parent.

APPEAL from judgment of the Superior Court of Santa Clara County, in favor of plaintiff, and from an order denying a new trial. The facts are stated in the opinion. *Judgment reversed.*

H. V. MOREHOUSE, HIRAM D. TUTTLE, H. L. GEAR, ISAAC FROHMAN, and J. E. FOULDS, for appellant.

D. M. DELMAS, WILLIAM L. GILL, and BULL & CLEARY, for respondent.

The Court. — Miles Pepper, a young man of twenty-five years, in driving across the track of the defendant's railroad in or near the town of Los Gatos, was killed by a passing train. Miles was never married, and the plaintiff, his father and heir at law, brought this action, alleging that his son's death was caused by the carelessness and negligence of the defendant.

The answer denied all negligence on the part of the defendant, and alleged that the death of the deceased was caused by his own negligence.

The jury found for the plaintiff, and assessed his damages at \$8,000. This appeal is from the judgment and from an order denying defendant's motion for a new trial.

Several exceptions were taken to evidence and to instructions given and refused, and it is further specified that the verdict is not justified by the evidence in many particulars. The more important specifications of insufficiency of the evidence are, in substance: 1. That the evidence was insufficient to show negligence on the part of the defendant; and 2, that it does show negligence on the part of the deceased contributing proximately to the accident.

1. The complaint alleged the negligence of the defendant to consist in not giving any warning, either by ringing a bell or sounding a whistle, of the approach of the train, and in causing the train to approach the crossing at a reckless and negligent rate of speed, and in its negligence in obstructing the view of its track at said crossing.

Some of plaintiff's witnesses testified that no bell was rung or whistle blown as a warning of the approach of the train to the crossing, nor until the danger signal was blown, when the engine was so near the crossing that it was too late to prevent the accident; others said they did not hear any whistle or bell until the danger signal was given; whilst about an equal number of defendant's witnesses testified that the bell was rung continuously from the time the train left the station at Los Gatos, a little more than three-fourths of a mile from the place of the accident, until the train stopped after the accident.

It is not necessary to discuss the question whether this evidence was sufficient to support a finding by the jury that the bell was not rung, inasmuch as the negligence of the defendant in not giving warning of the approach of the train to the crossing — if it did not give such warning — is not conclusive of its liability.

As to the rate of speed of the train the evidence was without conflict that it was going at the rate of thirty or thirty-five miles per hour. It cannot be said, as matter of law, that it is negligent or dangerous to run at that speed; and there is nothing in the record to show, as matter of fact, that it was negligent, unless it can be said to be negligence to cross any public road at a speed of thirty-five miles an hour, and that is not claimed by respondent. Nor is there anything in the record tending to show that the defendant obstructed the view of its track at said crossing, whether negligently or otherwise. Conceding, for the purposes of the case, that the defendant did not give the required warning of the approach of its train to the crossing, and that the omission was negligent, we think that the verdict was not justified by the evidence, for the reason that the defendant's negligence proximately contributed to cause the accident resulting in his death.

There is not only no evidence that the deceased used any care or made any effort to ascertain whether a train was approaching, but the evidence excludes the possibility of his having used any reasonable care or caution in approaching the crossing. The fact that his view was obstructed, after he crossed University avenue, made it negligence on his part to drive at a rate of speed which not only interfered with his hearing an approaching train, but made it difficult or impossible to stop. If he could not see an approaching train because his vision was obstructed, ordinary care for his own safety required him to stop in order that his hearing should not also be obstructed, and in any event to make his approach so slowly as to give him complete control of his team, and enable him to stop instantly if occasion required.

So far as the negligence of the deceased is concerned, we see no conflict in the evidence; and it is well settled in this State and elsewhere that, if his negligence contributed proximately to the accident resulting in his death, the plaintiff cannot recover, even though the defendant negligently omitted to give the warning of the approach of the train which the law and its duty required. *Hager v. Southern Pac. Co.*, 98 Cal. 309; *Flemming v. Western Pac. R. R. Co.*, 49 Cal. 253; *Glascoek v. Central Pac. R. R. Co.*, 73 Cal. 137 (1).

1. See the *Hager* case, reported with the *Glascoek* case 73 Cal. 137, on the *California* cases in this volume, next page. It is a rule of almost invariable application that a traveler who knows or

It is said, however, that the train was running at a rate of speed faster than usual. This could not affect the question, since the deceased could not have been misled by the unusual speed of the train, unless he saw or heard the train, and undertook to cross ahead of it; and to make such attempt and fail is conclusive evidence of negligence. Nor is the fact that the train was eight minutes late any excuse for the neglect of the deceased to take proper precautions in approaching the track. If he knew the precise time the train passed this crossing when on time he must have known that it had not passed. He crossed the track going east about fifteen minutes before the accident, which was before the train was due, and while he was on the east side he was at no time beyond sight and hearing of the train if it had passed. On the other hand, if he did not know when the train was due, it was clearly his duty, in the exercise of reasonable care and prudence for his own safety, to use all reasonable means to ascertain whether he might then cross without danger from a passing train.

It is argued by respondent that "if his horses were frightened by the negligent blowing of the whistle, and ran before they reached the right of way," it would not show that he did not intend to stop, look, and listen, when he reached a point where he could view the track. This argument assumes that the blowing of the whistle was negligence. We think it was not. The engineer, when he saw the wagon approaching behind the trees at a rapid gait, could not assume that the driver heard the train, and, under such circumstances, his duty was to attract the driver's attention by blowing the whistle. If the deceased had stopped his team, and thus indicated that he was aware of the approaching train, and was waiting for it to pass before attempting to cross, a different question might have been presented if the horses became frightened and unmanageable because of the sounding of the whistle.

In a similar case the Supreme Court of Iowa said: "When the

is bound to know that he is about to cross the track of a railroad, upon which trains may lawfully run at greater speed than ordinary vehicles upon highways, must both look and listen for approaching trains before even attempting to cross the track. *Shear. & Redf. on Neg. (5th ed.), § 476; citing, among other cases, Glas-*

cock v. Central Pac. R. R. Co., 73 Cal. 137.

The omission by a railroad company to give signals or keep within the speed prescribed by law does not excuse a person's failure to look and listen before crossing railroad track. *Glascok case, supra.*

engineer saw the team the whistle sounded twice. This, as we suppose, was the call for brakes, but counsel for the plaintiff insist that if it had not been done the collision would not have occurred. Possibly this is so, but the question is, Was the engineer negligent in thus sounding the whistle? We think not. In the first place, the engineer saw the horses close to the track, and that a collision would certainly occur unless something was done immediately to prevent it. To sound the whistle under the circumstances in the pending emergency was, we think, prudent and proper. There was no time for reflection. It was the usual thing to do, and, if the engineer had failed to do so, we think he possibly would have been negligent if a collision had occurred because of such failure." *Schaefer v. Chicago, etc., R'y Co.*, 62 Iowa, 624.

No exceptions were taken to the instructions given at plaintiff's request, but as the judgment and order must be reversed upon the ground hereinbefore considered, it is proper to notice instructions not excepted to, in view of further proceedings.

The fifth instruction given to the jury upon the point last above discussed was misleading and erroneous in two particulars: 1. That it assumes that if the deceased could not see the train, and was not aware of its approach, that he was not negligent. We have already held that, if he could not see the train because of obstructions, he was negligent in not resorting to other means reasonably within his power to ascertain whether a train was near; and, 2, it assumes that in blowing the whistle the engineer was negligent.

The court instructed the jury, at defendant's request, that the damages must be confined to the pecuniary loss suffered by the plaintiff, but afterwards, upon its own motion, the court further instructed the jury "that the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages you may, in addition, take into consideration the loss, if any, sustained by plaintiff in being deprived of the comfort, society, and protection of the deceased by reason of his death. * * * You are not to take into consideration sorrow, grief, or mental suffering, if any, occasioned by the death of decedent." This instruction is erroneous.

In *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 2 Am. Neg. Cas. 196, the court below, in an action brought

by the mother for the death of her infant daughter, charged the jury that "the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child;" and it was held that the instruction was erroneous. This question was fully discussed in that case, and it was clearly held that, in an action for damages for the death of a relative, the relations existing between the plaintiff and the deceased could only be considered in estimating the pecuniary loss (1). Here the jury were instructed that they were "not limited by the actual pecuniary injury sustained by the plaintiff." The instruction, therefore, permitted the jury to give the plaintiff more than his "actual" pecuniary loss. What meaning the court intended to convey by the word "actual" is not clear, but it is comprehensive enough to include all pecuniary loss, and that in actions of this character is the limit of compensatory damages. Besides, the jury were instructed that they might "in addition" — that is, in addition to the actual pecuniary injury — "take into consideration the loss, if any, in being deprived of the comfort, society, and protection of the deceased." Here, "the loss" is not restricted to pecuniary loss, but, as was said in *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 2 Am. Neg. Cas. 196, the jury "were given wide range to run into any wild and excessive verdict which their caprice might suggest." It may well be doubted whether the facts of this case justified any, even the most guarded, instruction in relation to compensation for the deprivation of the comfort, society, and protection of the deceased. The son was twenty-five years of age, and had the legal right to change his residence to a remote part of the State, or of the world, at any time he chose. He was not living with the plaintiff, though in the same town. The case was not like that of a husband and wife, a relation which the law presumes would have continued until the death of the plaintiff, nor like that of parent and minor child, where the right to select the residence of the child and to retain his society during minority is given by the law.

Some other instructions are criticised by appellant, but the

1. In *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 2 Am. Neg. Cas. 196, an action for injuries sustained while alighting from defendant's train, it was held not error to charge the jury that "money is an inadequate recompense for pain" where they are also instructed that "resulting pain is an element of damage to be compensated," and that if the plaintiff was entitled to recover, "the measure of her recovery is what is called compensatory damages."

general discussion we have given will sufficiently cover all other questions arising upon the instructions.

The only serious error in ruling upon the admission of evidence was corrected by the court.

The judgment and order appealed from are reversed, and the cause remanded

WHALEN ET UX. V. ARCATA AND MAD RIVER RAILROAD COMPANY.

Supreme Court, California, January Term, 1892.

[Reported in 92 Cal. 669.]

DRIVING ACROSS RAILROAD TRACK — DEFECTIVE CROSSING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In an action for damages for injuries sustained while driving across defendant's railroad track, where the evidence showed that plaintiffs were driving a steady horse, at the rate of five or six miles per hour, and did not slacken speed at the crossing; that the crossing was quite oblique, was on a level with the highway, and the rails projected above the planking about an inch or an inch and a half; that the crossing was filled in with planks, except that one plank had been removed which defendants neglected to restore, plaintiffs not knowing of the defect; and that when crossing, one of the wheels of their wagon caught in this defect and upset the wagon and plaintiffs were injured: *Held*, that plaintiff's failure to slacken speed at the crossing was not, as matter of law, negligence on their part, but the question of negligence was one of fact for the jury to determine.

APPEAL from a judgment of the Superior Court of Humboldt County, in favor of plaintiffs, and from an order denying a new trial. The facts are stated in the opinion. *Judgment affirmed.*

S. M. BUCK and C. M. WHEELER, for appellant.

FRANK MCGOWAN and J. D. H. CHAMBERLIN, for respondents.

Temple, C. — Appeal from judgment, and order refusing defendant a new trial. The plaintiffs are husband and wife, and bring this suit to recover damages for personal injuries received by the wife. They aver that defendant's road crosses the highway, and that defendant so negligently and carelessly kept and maintained the crossing that it was allowed to become grossly out of repair, and in an unsafe condition in this: "That said defendant allowed a space in said crossing, unnecessarily large, to be and remain between one rail of said road and said crossing at the point on said crossing on said road where vehicles were and are

usually driven;" that while plaintiffs were crossing with a cart, without fault on their part, but by reason of the unsafe condition of the crossing, "one of the wheels of said cart was caught in said large space between said crossing and said rail herein described, and the said cart was then and there overturned, and the plaintiffs violently thrown to the ground, whereby," etc. The court, in effect, charged the jury that the plaintiffs, in order to recover, must prove the allegations precisely as made; that it would not be sufficient to show that the crossing was defective in some other respect; as, that it crossed the highway at an angle, or that the rails were too high. The appellant claims that the evidence shows that the accident was not caused by the alleged defect. But we do not so understand the evidence. It seems to us that the very testimony so confidently referred to as sustaining the position of counsel, tends directly and plainly to show that the accident was caused in the precise manner alleged; and so it must have appeared to the jury which rendered the verdict, after an instruction so distinct and positive; and to the learned judge, who, of his own motion, gave the instruction, and refused a new trial. The natural effect of use would have been to deepen the impression near the rail, and, perhaps, to accumulate earth immediately against it, and it is easy to see how the removal of this earth, shortly before the accident, might, in the absence of the necessary plank, increase the liability to an accident precisely as charged in the complaint, and, as we think, some of the testimony tended to prove. That there was other testimony inconsistent with this can make no difference here. We find no evidence which tends to prove any other defect than that charge.

The only question, therefore, is whether plaintiffs were guilty of negligence which proximately contributed to the accident. That they were is claimed on two grounds: Plaintiffs were driving with reckless speed, and turned while on the track, instead of going directly across. Plaintiffs' evidence was to the effect that they were driving a steady horse, at the rate of five or six miles per hour, and did not slacken speed at the crossing. The crossing was quite oblique, was on a level with the highway, and the rails projected above the planking about one inch or an inch and one-half. The crossing was filled in with planks, except that defendant had removed one plank along the north rail, and had neglected to restore it. It was not shown that plaintiffs knew

of the defect. We cannot say, as matter of law, that under such circumstances the failure to slacken speed at the crossing was negligence. Had the crossing been in good order, we do not know that such speed would have been dangerous. So far as affects the liability of defendant, the plaintiffs had a right to assume that it had performed its duty, and had maintained the crossing in good condition. Although the evidence may not be conflicting, the question of negligence is peculiarly one for the jury. *Fernandes v. Sacramento City R. R. Co.*, 52 Cal. 48. Courts will not interfere with a verdict where the conclusion can fairly and reasonably be drawn from the evidence.

The evidence is not very clear that there was any turning on the crossing, or that plaintiffs crossed at a different angle from what travelers generally did. Minor was driving across at the same time, going in the same direction. He says that, having a fractious horse, he turned to the left as much as possible, to give them the road. He was asked: "Q. Did they keep on the traveled part of the road, or did they keep to the right? A. Well, I should think it was near the center of the road. It seemed so to me, because I had to push the wheel away with my hand to keep it from striking my buggy after they capsized." Q. When they drove across, did they not turn to get in ahead of you on the left there? A. Well, I think there was an effort to pull around me; they passed me right on the railroad track."

And again:

"Q. Did they turn to the left to get in ahead of you about the time the cart pitched? A. No, sir; I think they kept the middle of the road. I gave the road to them. They passed me, you understand, right on the track. Of course, they would naturally pull around a little as they passed. They upset to the east side; that is where they were thrown."

Again, examined by defendant's counsel: "Q. And of course they approached the road at a different angle from this main traveled track? A. Well, I should naturally suppose so. Q. Did the horse swing in towards you? A. Yes, sir. Q. That is, it swung in to the left? A. The moment they capsized the horse swung almost immediately against me."

The parties were going north. The acute angle of the crossing on the north side was on the right, and plaintiffs fell out on the right side, while the buggy and horse swung to the left.

James Chaffey was the only other witness, besides plaintiffs

and Minor, who testified for defendant as to this matter: "Q. When they came to the crossing, how did they manage? A. I wasn't looking; I was walking along; I didn't see what passed, but the cart wheels caught in the rails and tipped over." Afterwards he said they were going to pass Minor, and when they gee'd off was when they caught in the rail.

We think the jury would be justified in thinking that this was not what the witness saw, but his conclusion. He was not asked if he could see whether the wheel caught in the rail or not. He said: "I just saw it slide — it slid along a little. I was about fifty yards away; I had passed the track going to Arcata, and had to look around to see it."

But here, too, even admitting that appellant is correct as to its construction of the evidence, it was still properly left to the jury to say whether it was culpable negligence for plaintiffs to cross at the angle they did, and whether it contributed proximately to the injury. Had the crossing been in repair, it is possible that it would not have increased the danger. We certainly cannot say from the evidence that, had such been the case, a person of ordinary prudence would not have crossed as plaintiffs did. It was therefore a proper matter to be left to the jury, under the instructions of the court.

We think the judgment and order should be affirmed.

FOOTE, C., and BELCHER, C., concurred.

The Court. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

SWAIN V. FOURTEENTH STREET RAILROAD COMPANY.

Supreme Court, California, February Term, 1892.

[Reported in 93 Cal. 179.]

POLICE OFFICER INJURED IN COLLISION BETWEEN PATROL WAGON AND STREET CAR — DRIVING ON STREET CAR TRACK — NEGLIGENCE FOR JURY. — In an action to recover damages for injuries sustained by plaintiff, a police officer, who, while in charge of a patrol wagon which was being driven on defendant's street car track, was struck by defendant's car colliding with the wagon, it was held not negligence *per se* for the driver of the patrol wagon to drive along and upon defendant's track, so long as he used ordinary care to avoid collision with defendant's cars, it being a question for the jury whether the driver used ordinary care.

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NEGLIGENCE OF DRIVER OF STREET CAR — INSTRUCTION. — In such action it was proper to instruct the jury, in substance, that if, by reason of inattention, carelessness, or incompetency, the car driver failed to avoid the collision, defendant was liable, if there was no contributory negligence on the part of the plaintiff or the driver of the wagon.

DAMAGES — NOT EXCESSIVE. — A verdict for \$7,000 damages for injuries sustained by plaintiff, a police officer, in a collision between a patrol wagon, which plaintiff was using in the performance of his duty, and defendant's street car, whereby plaintiff was violently thrown to the ground, while considered large, is not so excessive as to be ground for new trial.

APPEAL from a judgment of the Superior Court of Alameda County, in favor of plaintiff, and from an order denying a new trial. The facts are stated in the opinion. *Judgment affirmed.*

FOX, KELLOGG & KING, for appellant.

JAMES A. JOHNSON and A. A. MOORE, for respondent.

De Haven, J. — Action for damages alleged to have been sustained by plaintiff through the negligence of defendant in running its street car against a wagon in which the plaintiff was riding, and thereby violently throwing him to the ground. The plaintiff recovered judgment for the sum of \$7,500 damages, besides costs; and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

1. The evidence upon the part of the plaintiff tended to show that between seven and eight o'clock in the evening of September 12th the plaintiff, who was a police officer of Oakland, went in charge of the police patrol wagon to a railroad station in that city for the purpose of conveying to the hospital a young man whose leg had been broken. The injured man was placed on a stretcher in the wagon, and the wagon was driven along the track of the defendant's street railroad, not far behind a street car, and at about the same rate of speed. The car which the wagon was following turned off on a switch where the street cars pass each other, and very soon thereafter a car coming from the opposite direction on the main track came in collision with the wagon, by reason of which plaintiff sustained the injuries complained of. As to what took place immediately after he saw the approaching car, and before the collision, the driver of the patrol wagon testified: "I started to pull my wagon out of the track. I had to do it slow, on account of the man, and I saw this fellow was coming up before I could get out; and I hollered and said, 'You stop your car until I can get out.' He paid no attention, and came on. It seemed as though he came faster. Then Officer Babb

hollered. He took no notice of it at all. He was looking behind his car. When I first hollered to him, he was about sixty feet away. I hollered as loud as I could. Officer Babb sung out very loud — as loud, I guess, as he could holler. I said: 'Stop that car. Stop that car.' When Babb hollered, he said: 'Stop the car. Stop the car.' The driver of the car was looking behind the car; turned away looking around the corner of the car, looking at the other car going on, I suppose. The other car had passed at that time." This testimony was corroborated by other witnesses, all tending to show that the driver of the wagon was endeavoring to avoid the collision in the manner stated by him and that the driver of the car made no attempt to slacken its speed. The court did not, in view of this evidence, err in denying the motion of the defendant for a nonsuit. It was not negligence *per se* for the driver of the patrol wagon to drive along and upon the track of the defendant's road. He had a right to do this, so long as he used ordinary care to avoid any collision with defendant's cars. *Shea v. Potrero, etc. R. R. Co.*, 44 Cal. 414; *Fleckenstein v. Dry Dock, etc. R. R. Co.*, 105 N. Y. 655; *Thomp. Neg.*, p. 396. And it was clearly a question for the jury whether the driver of the patrol wagon did use ordinary care in endeavoring to avoid the collision, or whether he ought not to have turned out of the track more quickly when he saw defendant's car approaching. This evidence was also sufficient to show that the driver of the car was negligent in omitting, without any apparent excuse, to look ahead, and observe whether the track was clear. It is the duty of such a driver, equally with the driver of any other vehicle, to observe what is in the road before him, so as to avoid inflicting injury upon others, if practicable (1).

1. *Duty of street railway companies to exercise care to avoid collisions with wagons — Right of way.* — A street railroad company has no exclusive right of travel upon its track, and it is bound to use the same care in preventing a collision, as the driver of a wagon or other vehicle. See *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413.

In *Chicago W. D. R. Co. v. Ingham*, 131 Ill. 659, where plaintiff's person and his horse and buggy were injured in collision with defendant's

street car, it was held that an instruction asked by defendants that a street car is entitled to the track on meeting other vehicles, and that the vehicle should yield the right of the track to the car, would have misled the jury into the belief that the street car company was not bound to exercise due and proper care to prevent collisions with others using the same street, and was properly refused.

In *North Hudson R'y Co. v. Isley*, 49 N. J. L. 468, collision between wagon and horse car, it was held that

2. The instructions of the Court, taken as a whole, fully and fairly stated the law applicable to the case, and as to the respective rights of the parties to the use of that portion of the street in which defendant's track is laid, and as to the degree of care which each was required to exercise in order to avoid coming in collision with the other. In the introductory part of its instructions the court said: "You are the sole judges of the evidence given by all the witnesses here; and if you believe from the evidence that the plaintiff has sustained damage, under the circumstances he represented to you by the evidence, and under the law as now being given to you by the Court, your verdict must be for plaintiff." The appellant contends that this statement took away from the jury the right to pass upon the questions of negligence and contributory negligence, and made the right of plaintiff to a verdict depend alone upon the fact that he had been injured. This language of the court was not as carefully expressed as it should have been; but we do not think, in view of the full and complete instructions which followed, that it could have been understood by the jury otherwise than as declaring that they should give a verdict for the plaintiff if, upon the evidence and under the law then about to be given, they were convinced that he was entitled to it.

3. There was no error in the instruction numbered 6. In

when a horse car is passing on its track in a public highway, it is the duty of the driver of any vehicle to remove such vehicle from the track in time to give free passage to the street car.

In *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530, rear-end collision between wagon and horse car, it was held that one of the public has a right to drive his vehicle upon a street railway track, as well as to cross it at the intersection of streets, but he should not only at once turn off the track when called upon to do so by an employee of the street car company so as to make way for a car approaching from behind, but also listen to whatever signal there might be from such a car; and he should also look behind him from time to time, to see whether

he should not soon turn off, so that a car may pass without undue slackening of ordinary speed.

Electric cars. — In *White v. Worcester Consol. St. R. Co.*, 167 Mass. 43, collision between vehicle and electric car, it was held that in view of the inability of electric cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them; but, subject to that, and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable delay upon the track.

substance, it told the jury that if, by reason of inattention, carelessness, or incompetency, the car-driver failed to avoid the collision, the defendant was liable, if there was no contributory negligence on the part of the plaintiff or the driver of the wagon; and the statement in the preceding part of the instruction, that street cars are easily and readily stopped, could not have prejudiced the appellant. The fact itself is one of common knowledge, and which the jury might properly consider without any other evidence of its existence. The instruction, as given, left the jury entirely free to draw from the fact alluded to such inferences as they thought proper, and contained no expression or intimation of the opinion of the court as to the weight which should be accorded to it in their deliberations.

4. The amount of the verdict in this case is large, but we cannot say that it is suggestive of either passion or prejudice on the part of the jury. In fixing damages in this class of cases, much is left to the discretion of the jury; and, when the verdict has been approved by the trial court, this court is not authorized to grant a new trial upon the ground of excessive damages, except in a case where it is plain that the verdict was not the result of the fair and honest judgment of the jury.

We find no error in the record. Judgment and order affirmed. MCFARLAND and SHARPSTEIN, JJ., concurred.

Hearing in Bank denied.

HAGER V. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, May Term, 1893.

[Reported in 98 Cal. 309]

COLLISION AT RAILROAD CROSSING BETWEEN WAGON AND TRAIN — NEGLIGENCE OF ENGINEER — CONTRIBUTORY NEGLIGENCE OF DRIVER OF WAGON — RAILROAD NOT LIABLE. — In an action to recover damages for injuries to plaintiff's team and horses resulting from a collision with defendant's train at a railroad crossing, where it appeared that the train was going at the rate of thirty to thirty-five miles an hour; that the engineer did not ring the bell nor blow the whistle as required by statute; that the driver of the wagon did not check the speed of his team nor listen for approaching trains before driving upon the crossing, although he knew a train was due at the time and that his view of the track would be obstructed until he arrived within forty feet of the crossing; it was *held* that the conduct of the driver indicated a degree of negligence closely allied

to recklessness, and although the defendant's engineer was negligent, the defendant was not liable where plaintiff's negligence contributed to the injury, unless defendant's conduct was wilful and wanton (1).

APPEAL from a judgment of nonsuit rendered in the Superior Court of Alameda County. The facts are stated in the opinion. *Judgment affirmed.*

D. L. SMOOT, for appellant.

A. A. MOORE and JAMES C. MARTIN, for respondent.

Garoutte, J.—This is an action to recover damages for injuries to property (horses and harness), resulting from a collision with a train of cars at a railroad crossing in the city of Oakland. A nonsuit was ordered by the trial court, and the plaintiff has appealed.

The accident occurred in the settled portion of the city. The train was going at the rate of thirty or thirty-five miles an hour, and the engineer was neither ringing the bell nor blowing the whistle, as required by the statute. The team injured consisted of six horses attached to a band wagon containing sixteen men. The train was a regular train, and known to be due at that point by the driver of the horses at about the time of the injury. The view of the track towards the point from which the train was approaching was obstructed until the driver arrived within about forty feet of the crossing, when he would be able to see an approaching train for a distance of 250 yards. The bill of exceptions contains further recitals of the evidence as follows: "The driver approached Short street crossing at a jog trot, and without stopping or checking the speed of his steam, and, before the

1. *Contributory negligence in crossing railroad track.* — The New Jersey court holds that the failure of a railroad company to give signals will not relieve the traveler from his duty of looking and listening before crossing railroad track. See *Railroad Co. v. Righter*, 42 N. J. L. 180.

See also *Railroad Co. v. Howard*, 124 Ind. 280; *Grostick v. Railroad Co.*, 90 Mich. 594; *Blackburn v. Southern Pac. Co. (Oregon)*, 55 Pac. Rep. 225. It was held in the latter case that where deceased, without stopping his vehicle for the purpose of listening for approaching trains, attempted to drive across a railroad track in a city street,

at a crossing with which he was familiar, and from which the view of the approaching train was obstructed, and was killed by a train while making such an attempt, a verdict should be directed for the railroad company, although the traveler was approaching the crossing at a slow walk, and the train was running at an unlawful rate of speed; that a failure to stop and listen before attempting to cross, under such circumstances, was negligence *per se*. The opinion in the *Blackburn* case, *supra*, reviews the leading cases upon this subject, and contains a clear statement of the law.

crossing was reached by the train, one or two of the passengers jumped from the wagon while it was in motion, because nervous about riding over railroad tracks. The driver of the team did not check the speed of his team and listen for approaching trains before driving upon the crossing, although he knew the train was due about that time, and although he knew that by reason of the intervening houses he could not see the approaching train until his team would be within a few feet of the crossing, yet he drove on at the jog trot at which he had been previously driving, without stopping or checking his speed or lessening the noise of his team, or adopting any precaution, or making any effort to listen for the approaching train while his vision was obstructed, or observing the precaution of looking after reaching a point where his vision was unobstructed."

No comment by the court upon this state of facts is demanded. The conduct of the driver indicates a degree of negligence closely allied to recklessness. His negligence would have been but one degree more culpable if he had driven his team upon the track, and there awaited the coming train and the inevitable collision. The conduct of both plaintiff and defendant clearly indicates an absence of the exercise of the most ordinary care, and under those circumstances the defendant is not liable, unless the acts which resulted in the injury were wilfully and deliberately done, and the evidence does not go that extent. This is the established doctrine, and is supported in this State by an unbroken line of authority. We are satisfied with the construction of section 486 of the Civil Code announced in *Meeks v. Southern Pacific R. R. Co.*, 52 Cal. 604; also that the offer of evidence that subsequent to the accident the defendant placed an automatic bell at the crossing where the collision occurred was properly rejected. *Sappenfield v. Main St. R. R. Co.*, 91 Cal. 61. For the foregoing reasons let the judgment be affirmed.

HARRISON and PATERSON, JJ., concurred. Hearing in Bank denied.

ORCUTT v. PACIFIC COAST RAILWAY CO.

Supreme Court, California, August Term, 1890.

[Reported in 85 Cal. 291.]

FAILURE OF RAILROAD COMPANY TO GIVE WARNING AT CROSSING — STATUTORY LIABILITY — PRESUMPTION OF NEGLIGENCE. —

Where an injury at a railroad crossing is caused by a locomotive, upon which a bell was not kept ringing continuously nor a whistle blown at intervals at a distance of eighty rods before reaching the crossing, and also in passing over it, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his own negligence. Civil Code, § 486 (1).

ANIMALS KILLED AT CROSSING — FAILURE TO GIVE SIGNAL — PRESUMPTION OF NEGLIGENCE. —

In an action to recover damages for the killing of animals at a railroad crossing, where the failure to give warning of the approach of the locomotive, as required by Civil Code, § 486, is proved, evidence as to whether the engineer could see the animals near the track when approaching the crossing was immaterial because, whether he did or did not see them before they came running upon the track when the engine was but forty feet from the crossing, and did all he could to avoid injuring them, if he failed to give the required signals, such omission amounted to presumptive negligence (2).

1. As to duty of railroad companies to signal to cattle on tracks, see *Douglas v. East Tenn., etc., R. R. Co.*, 88 Ga. 282; *Chicago, etc., R. R. Co. v. Fenn*, 3 Ind. App. 250; *Parker v. Lake Shore, etc., R. R. Co.*, 93 Mich. 607; *Palmer v. St. Paul, etc., R. R. Co.*, 38 Minn. 415; *Wallace v. St. Louis, etc., R. R. Co.*, 74 Mo. 594; *Fisher v. Penn. R. R. Co.*, 126 Pa. St. 293; *Fink v. Evans*, 95 Tenn. 413; *Texas, etc., R. R. Co. v. Cunningham*, 4 Tex. Civ. App. 262; *Eddy v. Evans*, 58 Fed Rep. 151.

2. *Live stock killed by railroad trains — presumption of negligence — burden of proof — statute.* — In Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Mississippi, North Carolina, North Dakota, South Dakota, Texas, and Washington, statutes have been enacted directing that the mere fact of an injury to animals on railroad tracks by trains establishes a presumption of negligence against the railroad company, which can only be removed by

affirmative evidence that it used ordinary care. See *Mobile, etc., R. Co. v. Caldwell*, 83 Ala. 196; *Louisville, etc., R. Co. v. Kelsey*, 89 Ala. 287; *Memphis, etc., R. Co. v. Jones*, 36 Ark. 87; *St. Louis, etc., R. Co. v. Vincent*, 36 Ark. 451; *St. Louis, etc., R. Co. v. Hagan*, 42 Ark. 122; *Jacksonville, etc., R. Co. v. Wellman*, 26 Fla. 344; *Jacksonville, etc., R. Co. v. Garrison*, 30 Fla. 567; *Georgia, etc., R. Co. v. Parks*, 91 Ga. 71; *Georgia, etc., R. Co. v. Middlebrooks*, 91 Ga. 76; *Ala., etc., R. Co. v. Blivens*, 92 Ga. 522; *Wall v. Des Moines, etc., R. Co.*, 89 Iowa, 193; *Ky., etc., R. Co. v. Talbot*, 78 Ky. 621; *Grundy v. Louisville, etc., R. Co. (Ky.)*, 2 S. W. Rep. 899; *Louisville, etc., R. Co. v. Smith*, 67 Miss. 15; *Pippen v. Wilm., etc., R. Co.*, 75 N. C. 54; *Randall v. Richmond, etc., R. Co.*, 107 N. C. 748; *Huber v. Chicago, etc., R. Co.*, 6 Dak. 392; *Bates v. Fremont, etc., R. Co.*, 4 S. D. 394; *Joliffe v. Brown*, 14 Wash. St. 155.

CONTRIBUTORY NEGLIGENCE — WHEN QUESTION OF LAW. — Ordinarily, the question of contributory negligence, like that of negligence, is a question for the jury, but when the evidence tending to establish it is undisputed, as in the present case, it becomes a matter of law for the court to determine.

THORNTON, J., *dissented*.

ANIMALS RUNNING AT LARGE — TRESPASSING ON RAILROAD TRACK — STATUTE — EVIDENCE — PROXIMATE CAUSE. — Even were it a fact that plaintiff's animals were running at large, where they might trespass upon defendant's right of way, contrary to the statute requiring all cattle to be confined by their owners to prevent trespass upon the land of others, the defendant could not rely upon that fact alone, but would still have to show that it was the proximate cause of the injury complained of (1).

See also the following statutes as to presumption of negligence in live-stock cases: Arkansas: Sandels & Hill Dig. Stat. 1894, § 6356; Dakotas: Code Civ. Pro., § 679; Iowa: Code, § 1289; Kentucky: Gen. St., ch. 57, § 5; Mississippi: Code, § 1059; North Carolina: Code 1883, § 2326; Texas: Rev. St. 1895, art. 4527-4528; Washington: Laws 1893, p. 418.

But, except in South Carolina, no such presumption exists at common law, in favor of cattle straying upon the premises of a railroad company, even in those States which recognize the right of cattle to be at large. See 2 Shearm. & Redf. Negl. (5th ed.), ch. 20, §§ 418-456, pp. 707-770, relating to railroad injuries to animals.

1. *Liability of railroad companies for injuries to animals on track.* — In *Robinson v. Denver & Rio Grande R. R. Co.* (Colo.), 2 Am. Neg. Rep. 495, where the only evidence of negligence, in an action for the killing of plaintiff's mule, on defendant's track, was that of the engineer, that the train might have been stopped within 500 or 600 feet, and that on the night in question he could see an object 400 feet ahead of him, the plaintiff failed to establish negligence and judgment for him was properly reversed. Judgment of Court of Appeals, reversing judgment for plaintiff in trial court, affirmed. See 40 Pac. Rep. 840.

In *Mobile & Ohio R. R. Co. v. Weems* (Miss.), 1 Am. Neg. Rep. 289, where the facts were undisputed that the engineer did all that was possible to avoid a collision between his engine and a horse on the track, having given a long whistle as a signal, a verdict for plaintiff was not justified.

In *Yazoo & Miss. Valley R. R. Co. v. Whittington* (Miss.), 1 Am. Neg. Rep. 286, where a horse, drinking at a pond about twelve feet from a railroad track, ran up a bank ten or twelve feet high, and got in front of a moving train and was killed, the engineer having cut off steam to lower the speed of the train and signalled by whistle when he saw the horse on the track, it was held that it was not required that a train be stopped, nor its speed checked because animals are discovered near a track.

"It is not the duty of the engineer to stop his train until there is an apparent necessity for it. Ordinarily, the discovery of animals or persons near the road does not require the stopping of the train." *Railroad Co. v. Brumfield*, 64 Miss. 637; *Railroad Co. v. Thornton*, 65 Miss. 256.

"Unless appearances really indicate danger of their [animals] going upon the track, neither the stoppage nor an effort to stop the train is required. Rapid movements and regular connections are among the chief advantages of transportation by railroads. This is

APPEAL from a judgment of the Superior Court of San Luis Obispo County, in favor of plaintiff, and from an order denying a new trial. The facts are stated in the opinion. *Judgment affirmed.*

GRAVES, TURNER & GRAVES, for appellant.

VENABLE & GOODCHILD, for respondent.

Gibson, C.—This action was brought by the plaintiff to recover damages for a mare killed and a colt injured by the locomotive and cars of the defendant corporation, which locomotive and cars, it is alleged in the complaint, were so negligently managed and run over that portion of defendant's railway which passes through the plaintiff's land, and were driven at such undue speed, and without ringing any bell or sounding any whistle or other alarm, in approaching the crossing on said land as to run against the mare and colt, then casually, and without any fault of plaintiff, passing across the track at said crossing. Judgment for the plaintiff was entered upon a verdict in his favor. From the judgment, and an order denying a new trial, the defendant brings this appeal.

The lane which formed the crossing with defendant's railway, where the engine ran against the animals, is an open one used by the public, and extends from plaintiff's house to a public highway just beyond the railway, and crosses the latter at right angles, and at about one half of a mile from plaintiff's house. The railway is inclosed upon the sides with substantial fences,

a duty they owe to the public; and if a train must stop or check up whenever an animal is near the track, such duties could not be properly discharged." *Railroad Co. v. Bourgeois*, 66 Miss. 3.

Under sections 1, 2, art. 1, ch. 72, Comp. St. Nebraska, a railroad company is liable for injuries caused by a moving train to cattle, horses, sheep, or hogs upon its track at a place where it ought to have been, but was not, fenced; although there was no actual collision between the train and the animals injured. *C. B. & Q. R. R. Co. v. Cox*, 2 Am. Neg. Rep. 746. *Following* *R. R. Co. v. Pounder*, 36 Neb. 247; and *overruling* *R. R. Co. v. Shoemaker*, 18 Neb. 369.

In *Railroad Co. v. Lamb*, 11 Neb.

592, it was held that under the law quoted in preceding paragraph, railroads were liable to the owner of stock killed or injured in consequence of the omission to fence their track. In *R. R. Co. v. Shoemaker*, 18 Neb. 369, it was held that contact of the cars with the animal injured was necessary to create a liability, but in *R. R. Co. v. Pounder*, 36 Neb. 247, it was held that such contact was not necessary to create a liability.

In *Southern R'y Co. v. Phillips* (Tenn.), 3 Am. Neg. Rep. 610, an action to recover damages for injuries to plaintiff's mare while on defendant's track, it appeared that the animal ran on the track in front of one of defendant's engines, that the engineer used every effort to compel her to get off the

and at the crossing with cattle-guards. On the morning of the accident the plaintiff, while on the way to town, saw the mare and colt, with other cattle, unattended in the lane near his house, the mare and colt being then turned in the direction of the railway, but he passed on and did not try to prevent them from straying thereon.

The evidence is conflicting as to whether a bell was kept ringing or a whistle sounding at intervals in approaching the crossing, and also as to which side of the track the mare and colt came from in getting on the track. That of the plaintiff tended to show that no warning signals were given upon the engine in approaching the crossing or in passing over it; and that the mare and colt came from the east or right-hand side of the track, and could have been seen by the engineer upon the locomotive; while that of the defendant tended to prove that the whistle was blown at about one half of a mile before reaching the crossing, and that, from a point eighty rods from the crossing, the bell was kept ringing and the whistle sounding at intervals until within forty feet of the crossing where the collision occurred; that the animals approached from the west or left-hand side; that there is a sharp curve to the right in the track near the crossing, and a cut in the lane on the west or left-hand side, from which the animals came, of from two to four feet in depth, which prevented the engineer, in his position on the engine, from seeing them,

track, and finally succeeded, when the animal ran onto a trestle bridge and was injured. *Held*, that there was no negligence on the part of the railroad company and judgment for plaintiff was reversed. In commenting on this case the editor of *AMERICAN NEGLIGENCE REPORTS*, in a note touching on contributory negligence of animals, referring to the duty of railroad companies towards animals on tracks, said:

"The Court, no doubt, in the above case [*Southern R'y Co. v. Phillips*], appears to have been influenced in its decision by its leaning against the mare because of her close consanguinity to a mule, against which the decisions heretofore seem to have been unfavorable, but as the mare was not

the plaintiff, nor interested in the money to be recovered, it is difficult to see from a 'horse sense' view of the case, which the Court seems to have taken, why the owner's conduct in the care of the animal had not quite as much to do with the defendant's responsibility as a matter of law, as did the 'trapeze antics' of the mare.

"Under the authorities the railroad is bound to exercise care to avoid injury to any animal on its tracks, not excluding mares, even if trespassers thereon. *Vanhorn v. Burl., Cedar R. & N. R. Co.*, 63 Iowa, 67; *Moses v. So. Pac. R. Co.*, 18 Ore. 385; *Pritchard v. La Crosse & Milw. R. R. Co.*, 7 Wis. 232; *Chicago & N. W. R. Co. v. Goss*, 17 Wis. 428.

"But, by the common law, animals

and that he did not see them until within forty feet of the crossing, when they came running upon the track; that immediately the engineer reversed the engine, applied the air-brakes, and did all he could to prevent colliding with them, but without effect.

Upon this state of facts the court, in one of the instructions given at the request of plaintiff, declared the rule to be that where an injury at a railroad crossing is caused by a locomotive, upon which a bell was not kept ringing nor a whistle blown at intervals for a distance of eighty rods before reaching the crossing, and also in passing over it, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his own negligence. The giving of this instruction the defendant claims was error, and it contends that the court should have charged the jury as requested by it, to the effect that the mere failure to ring the bell or blow the whistle in approaching the crossing would not render it, the defendant, liable, unless it was proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury.

The question, then, is, and it is the principal one in this case, whether the failure of a railroad corporation to ring a bell continuously or sound a whistle at intervals for a certain distance in approaching a crossing, and in passing over it, will render the corporation *prima facie* liable for any injury caused by its

on a railway track are trespassers, and the owner is bound to keep them from entering thereon. Therefore, if they are injured on the tracks, the company is not liable except they are recklessly injured. This is upon the ground that the owner has contributed to the injury, not the animal, as in the case reported above. *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Pittsburg, Cin. & St. L. R. Co. v. Stuart*, 71 Ind. 500-504; *B. & O. R. R. Co. v. Lamborn*, 12 Md. 257; *Darling v. Boston & Albany R. R. Co.*, 121 Mass. 118; *Williams v. Mich. Cent. R. Co.*, 2 Mich. 259; *Woolson v. Northern R. R. Co.*, 19 N. H. 267; *Vandegrift v. Rediker*, 22 N. J. L. 185; *North Penn. R. R. Co. v. Rehman*, 49 Pa. St. 101."

In *Blankenship v. Kanawha & Mich. R'y Co.* (W. Va.), 2 Am. Neg. Rep. 475, it appeared that on a light moonlight night a passenger train of cars was coming at usual speed on a clear, straight track, where a mule upon the track could be seen 250 yards or more. A mule goes up a fill to the railroad track far enough in front of the engine to walk along the track in the direction the train was going, some forty feet before the engine overtook and killed it, the engineer failing to ring the bell or blow the whistle, or to do anything to prevent the accident, if possible. Held to be evidence tending to prove negligence on the part of defendant, and in absence of any rebutting evidence, sufficient to support verdict for plaintiff.

locomotive at such crossing, not contributed to by the person who sustains the injury. We think it will.

By section 486 of the Civil Code it is provided: "A bell of at least twenty pounds weight must be placed on each locomotive-engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road, or highway, or a steam-whistle must be attached and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the district attorney of the proper county, for the use of the State. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train, or cars, when the provisions of this section are not complied with."

This section is too plain to admit of construction; it means what is so clearly expressed in it. It is designed, under the penalty of a fine and a *prima facie* liability for injury caused by locomotives, trains, or cars at a street or road crossing, to compel railroad corporations to exact vigilance and diligence of those to whom they intrust the running of engines, trains, or cars across such places of danger to the public as streets and highways.

As already stated, the evidence as to whether the bell was rung or the whistle blown upon the locomotive on approaching the crossing was conflicting, and seems to have been evenly balanced; in such a condition of the evidence it was for the jury alone to determine the question, and in finding a general verdict for the plaintiff, which covers all the material issues, they determined it adversely to the defendant, and it cannot now be disturbed.

In view of the meaning of the above section of the Code governing this case, the evidence as to whether the engineer, from his place on the engine, could see the animals near the track when the engine was approaching the crossing becomes immaterial, because whether he could see them or not before they came running upon the track when the engine was but forty feet from the crossing, and though he then did all he could to avoid injuring them, if he failed to give the required signals, such omission amounted to presumptive negligence. Even if, as defendant contends, it was incumbent upon plaintiff to prove that the failure to give the required signals was the proximate cause of

the injury before he could recover, in which case it would be material whether the engineer could have seen the animals in time to prevent any injury to them, though they might have been on the track through plaintiff's want of ordinary care, still, as the evidence on this point was strongly conflicting, we would, upon the same principle applicable to a finding by a jury upon conflicting evidence, be constrained to hold that the jury had, in finding for the plaintiff, impliedly passed upon it in his favor.

The remaining question is, whether the plaintiff was guilty of contributory negligence.

That the above section of the Code did not abrogate the doctrine of contributory negligence was determined in *Meeks v. S. P. R. R. Co.*, 52 Cal. 602, and *Glascok v. Central Pacific R. R. Co.*, 73 Cal. 137. This was recognized by the trial court, and stated to the jury in the instruction complained of, as well as in other appropriate instructions given.

Ordinarily, the question of contributory negligence, like that of negligence, is a question for the jury, but when the evidence tending to establish it is undisputed, as in the present case, it becomes a matter of law for the court to determine. (*Glascok v. Central Pacific R. R. Co.*, 73 Cal. 137.) The only evidence here in support of it is that, on the morning of the day on which the collision occurred the plaintiff, who was on his way to town, saw the mare and colt with other cattle in the open lane, near the house, which was half a mile from the railway, and passed on to town without endeavoring to prevent them from straying upon the track, towards which the mare and colt were turned at the time.

Now, assuming that the act of March 7, 1878 (Stats. 1877-78, p. 176), applicable to San Luis Obispo county, requires all cattle to be confined by their owners, to prevent trespass upon the land of others, and that plaintiff's mare and colt were running at large in the lane, where they might trespass upon defendant's right of way across the lane, contrary to the provisions of such act, the defendant upon its part could not rely on this fact alone, but would still have to show that it was the proximate cause of the injury complained of. (See *Seigel v. Eisen*, 41 Cal. 109.)

The cattle when last seen by the plaintiff were nearly one half a mile from the track, and the plaintiff had a right to assume that the required statutory signals would be given by defendant, so that if his mare and colt should reach the track when any

locomotive or train was about to pass over the crossing, they would thereby be driven off or from the track, as the only directions they could have run from the track was down the lane on one side or to the highway on the other. (Higgins v. Deeney, 78 Cal. 578; Williams v. O'Keefe, 9 Bosw. 536; Jetter v. New York, etc., R. R. Co., 2 Abb. Ct. App. Dec. 458.)

Hence, we think that, although the plaintiff may not have been entirely free from blame in leaving the mare and colt untended with other animals in the lane near the house, and nearly half a mile from the track, such fact is too remote to be regarded as the proximate cause of the injury, and therefore advise that the judgment and order be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The Court. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

THORNTON, J., concurring. — I concur in the judgment, and in the conclusions reached by the opinion; but I do not concur in the *dictum* that when the facts are undisputed, negligence is a question of law. The correct rule is laid down in *Fernandes v. Sacramento City R. R. Co.*, 52 Cal. 45, where the subject is fully discussed, and the conclusion there reached fortified and sustained by reason and authority. (See also *Payne v. R. R. Co.*, 83 N. Y. 574, and cases there cited.) If the rule as declared in the *dictum* above stated has ever been regarded as a law, it has long ago been rejected as unsound by jurists and courts. In the case under consideration the negligence was too remote, as is clearly shown in the opinion of the learned commissioner.

COLLISION BETWEEN RAILROAD CAR AND WAGON — CARE REQUIRED IN OPERATION OF ROAD. — In *WILSON v. CUNNINGHAM AND POTTER*, 3 Cal. 241 (1853), defendants were owners of a private railroad, constructed by them, and run with machinery under a license from the city councils, through certain streets of San Francisco. Plaintiff claimed damages for injuries done to himself, his horse and wagon, in a collision with the railroad cars, charging defendants with negligence, *Held*, that where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, and in the pursuit of a business which involves constant risk and danger, he is bound, in the exercise of such right, to use extraordinary care. Judgment for plaintiff for \$959.50 affirmed.

PASSENGER ON STREET CAR PLATFORM INJURED BY COLLISION OF DRAY WITH STREET CAR — NEGLIGENCE OF PARTIES FOR JURY. — In **SEIGEL v. EISEN**, 41 Cal. 109 (1871), collision between a street car, on which plaintiff was a passenger and standing on the platform of the car, and a dray belonging to defendants which was negligently driven by their agent, judgment for plaintiff was affirmed. Rhodes, Ch. J., in his opinion, said: "The court cannot pronounce, as matter of law, that the conduct of the plaintiff in standing on the rear platform of the street car and steadying himself by holding the rail of the platform, was contributory negligence — that it contributed proximately to the injury inflicted on his hand by the wheel of the defendants' dray, which was passing along the rear of the car. The question whether the defendants' drayman could, by proper care, have avoided the collision between the dray and car, is a question of fact for the jury. His testimony that the collision would not have occurred except for the slipping of the wheels of the dray on the track, does not conclusively repel the imputation of negligence." * * * Judgment affirmed.

PERSON WALKING ON STREET RAILROAD TRACK STRUCK BY CAR — RIGHT OF WAY. — In **SHEA v. POTRERO AND BAY VIEW R. R. CO.**, 44 Cal. 414 (1872), action for damages for injuries to plaintiff, who was struck by one of defendant's cars, which was loaded with dirt, as he was walking along the street on which was defendant's track, on his way home at night, it was held that while a street railroad company has the right to run its cars upon a public street, where the public have an equal right to travel, and where it is presumed they will travel, it must exercise such care and precaution for the purpose of avoiding accidents, endangering property or person, as a reasonable prudence would suggest. A street railroad company has only an equal right with the traveling public to the use of the street, with some few exceptions, such as when an ordinary vehicle meets a street car on its track, it must give way to the car. *Held*, also, that a person may walk on a street railroad track, he using reasonable care and prudence to avoid injuries, but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the railroad company; and if he is injured by such carelessness while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence. Judgment for plaintiff for \$8,750 was reversed on the ground of erroneous instruction on the measure of damages, the jury not being entitled to take into consideration the fact that plaintiff was a man who had to depend upon his manual

labor for a living, as the damages are not in any manner dependent on the wealth or poverty of plaintiff.

PEDESTRIAN ATTEMPTING TO ESCAPE FROM IMMINENT PERIL — BACKING TRAIN WITHOUT WARNING — GROSS NEGLIGENCE. — In *ROBINSON v. WESTERN PACIFIC R. R. CO.*, 48 Cal. 409 (1874), it appeared that defendant's railroad ran through a city on a certain street, crossing another street at a right angle. At the time of the accident to plaintiff a train of defendants extended into the crossing of the two streets. Plaintiff, in proceeding across one of the streets, reached the railroad track a few feet in the rear of the train when the train, without warning, was backed, and plaintiff, in trying to escape imminent danger, ran on a trestle-work, and her arm was caught by one of the cars and injured, and she fell to the ground beneath the trestle-work. There was no brakeman or lookout to warn plaintiff of danger. *Held*, that the employees of defendant were guilty of gross negligence. Judgment for plaintiff for \$10,000 affirmed.

CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In *Robinson v. W. P. R. R. Co.*, 48 Cal. 426, *supra*, it was held that contributory negligence on the part of the injured party is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff. See also *Needham v. S. F. & S. J. R. R. Co.*, 37 Cal. 409; *Gay v. Winter*, 34 Cal. 153.

"In an action for damages for injury caused by negligence, a nonsuit on the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must necessarily be set aside." *Schierhold v. N. B. & M. R. R. Co.*, 40 Cal. 447.

This doctrine is affirmed in *Seigel v. Eisen*, 41 Cal. 109, where the court say: "The question whether the collision by which the injury was caused could have been avoided by proper care, is a question of fact for the jury."

In *Fernandes v. Sacramento City R'y Co.*, 52 Cal. 52, it is said: "If it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, the question of negligence is one of law, to be decided by the court. In all other cases the question must be

submitted to the jury under proper instructions." Citing numerous authorities.

In *Meeks v. Southern Pac. R. R. Co.*, 52 Cal. 602, it was held that plaintiff's contributory negligence would preclude recovery, even where defendant failed to ring its bell at a railroad crossing.

INFANT ON RAILROAD TRACK STRUCK BY TRAIN AT CROSSING — CONTRIBUTORY NEGLIGENCE. — In *MEEKS v. SOUTHERN PACIFIC R. R. CO.*, 52 Cal. 602 (1878), action for injuries sustained by plaintiff's son, a boy six years old, who, while on the railroad track, was struck by defendant's train at a crossing, it was held that the facts of the case showed such contributory negligence as to preclude recovery, and judgment for plaintiff for \$10,000 was reversed. It was held that § 486, Civil Code, "providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation, when a bell is not sounded or a whistle blown, as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action where the negligence of the plaintiff, if an adult, or if an infant, as here, the negligence of the parent or person standing in *loco parentis*, materially and proximately contributed to the injury."

COLLISION BETWEEN TRAIN AND WAGON AT RAILROAD CROSSING — NEGLIGENCE FOR JURY. — In *NEHRBAS v. CENTRAL PACIFIC R. R. CO.*, 62 Cal. 320 (1882), the question as to when the negligence of the parties in personal injury cases is for the jury, is fully discussed. The action was brought by the father to recover damages for loss of his five children, who were killed in a collision between a light wagon which the oldest child, sixteen years of age, was driving, and defendant's train, at a railroad crossing. The facts fully reviewed and held properly submitted to the jury on the question of the negligence of the parties. Judgment for plaintiff for \$10,800 affirmed.

COLLISION AT CROSSING — LIABILITY OF RAILROAD.— ERRONEOUS INSTRUCTION. — In *CARRAHER v. SAN FRANCISCO BRIDGE CO.*, 81 Cal. 98 (1889), an action for damages for injuries sustained by plaintiff in a collision between defendant's train and his horse and cart at a crossing, judgment for plaintiff for \$1,000 was reversed, for erroneous instruction, which assumed defendant's negligence being the proximate cause of the injury by reason of its omission to slow up the train or to station a flagman at the crossing, without regard as to whether the plaintiff was negligent.

KANSAS PACIFIC RAILWAY COMPANY v. WARD.*Supreme Court, Colorado, December Term, 1877.*

[Reported in 4 Colo. 30.]

RIGHT OF RAILROAD COMPANY TO EXCLUSIVE USE OF ITS ROADWAY — ORDINARY CARE REQUIRED. — A railway company has the undoubted right to the exclusive use of its roadway, except at public crossings, for the unimpeded passage of its trains; but notwithstanding the company's exclusive right to the use of its roadway, it is still bound to use ordinary care to avoid injury to persons who may be upon or near the track.

RUNNING FREIGHT TRAIN BACKWARDS — FAILURE TO WARN PEDESTRIANS — NEGLIGENCE FOR JURY. — Whether there was not a want of ordinary care, on the part of the defendant, in running its freight train backward within the city limits, at the rate of twelve or fifteen miles an hour, with many pedestrians passing along the side of its track, with a beam projecting a foot and a half beyond the side of the car, without lookout, brakeman, or signal to give notice or warning, was properly submitted to the jury (1).

CONTRIBUTORY NEGLIGENCE. — The question of contributory negligence is for the jury, to be by them determined in view of all the circumstances of the case.

APPEAL from judgment for plaintiff in the District Court of Arapahoe County. The facts are stated in the opinion. *Judgment affirmed.*

SAYRE, WRIGHT & BUTLER, for appellant.

V. D. MARKHAM, for appellee.

Elbert, J. — This is an action of trespass on the case, brought by the appellee against the appellant, to recover damages for injuries sustained by reason, as it is alleged, of the negligence of

1. **COLORADO CENTRAL R. R. Co. v. HOLMES**, 5 Colo. 197 (1880), an action for personal injuries sustained by plaintiff while walking on defendant's railway track, is distinguished from the case at bar as to the facts. **STONE, J.**, said: "This is unlike the case of *Kan. Pac. R'y v. Ward*, 4 Colo. 30, cited by counsel for plaintiff, where during 'Fair time,' a crowd of pedestrians was constantly passing along the line of the railway to and from the fair grounds; the railway company itself engaged in running excursion trains between the city and the fair, and where the injured person was struck by a projecting tim-

ber from a negligently loaded car, while he had approached the side of the track for the purpose of rescuing a child which he thought to be falling from one of the windows of a passing excursion train. In view of the gross and culpable negligence of the plaintiff [Holmes] in going upon the track at that place, and walking along it as she did, and the failure to show such want of care on the part of the defendant as that it might have avoided the accident notwithstanding the negligence of plaintiff, as the evidence is presented by the record, there can be no recovery, and the verdict was clearly against the

the appellant in running a certain train of cars, by which appellee was knocked down and so injured that amputation of his leg became necessary.

The jury returned a verdict for \$3,750, and judgment was rendered for that amount.

The evidence on behalf of the appellee, touching the circumstances under which the injury was sustained, consisted alone of his own testimony.

The motion for nonsuit raised the question whether the plaintiff was entitled to recover on his own statement of facts.

The locality of the accident was not a public highway or crossing, but at or near a footpath leading diagonally to and across the tracks of the defendant, and within the city limits.

A railway company has the undoubted right to the exclusive use of its roadway, except at public crossings, for the unimpeded passage of its trains. To travel upon the track laterally is negligence, and to do so in full view of an approaching train would, as a rule, be culpable negligence. *Shearm. & Redf. on Neg.*, §§ 489, 491; *Phila. & Reading R. Co. v. Hummell*, 44 Pa. St. 375; *Evansville, etc., R. Co. v. Hiatt*, 17 Ind. 102.

The plaintiff, however, according to his own testimony, which the motion for a nonsuit accepts as true, was not on the track of the defendant, but by the side of it, and sufficiently removed from it to be out of the reach of any danger from the passing train, but for the presence of a beam or tie, which lay across the end of the flat car, which was at the head of the train, having reference to the direction in which the train was moving.

evidence, and against the instructions of the court." * * * Judgment for plaintiff for \$5,000 reversed. On petition for rehearing, Stone, J. said that in going over the entire record he was more than satisfied of the correctness of the opinion reversing judgment and granting new trial. 5 Colo. 516.

See also *KENNEDY v. DENVER, SOUTH PARK AND PACIFIC R'Y CO.*, 10 Colo. 493 (1887), where plaintiff, while walking upon defendant's track in the daytime was struck by a locomotive attached to defendant's freight train. Judgment of nonsuit affirmed, plaintiff's contributory negligence precluding recovery, unless wantonness or

gross negligence of those operating train was proved.

A person may recover damages against a railroad company for injuries sustained, notwithstanding his own negligence contributed thereto, if the company, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid doing the injury. So held where plaintiff's wagon was demolished and his horses killed by being run over by defendant's engine, plaintiff being in defendant's yard at the time for the purpose of unloading coal from certain cars. *KANSAS PACIFIC R'Y CO. v. CRANMER*, 4 Colo. 524 (1879).

It was "fair time," and defendant was running excursion trains along its track, to and from the city and the fair grounds. Many persons were passing to and from the fair grounds, along and near the track where the accident happened.

The plaintiff, on approaching the road along the footpath, ran between the two tracks, which were about twelve feet apart, not for an idle purpose, but to rescue a child which he thought to be falling from one of the windows of a passing excursion train.

The train by which he was injured was a freight train, consisting of three box cars, two flat cars, and an engine; the box cars being next to the engine. The train was running backward, at the rate of twelve or fifteen miles an hour. The flat car in front was loaded with machinery, in connection with which, and perhaps to secure which on the car, the projecting beam was used; there was no lookout upon the advancing end of the train, nor any one on the train except on the engine; there was no warning given by those in charge of the train, by whistle or bell, or other means of warning.

The plaintiff saw the freight train about one hundred and fifty yards away, but did not pay special attention to it; he could not see the engine, and thought it was standing still or going the other way. Not the car, but the projecting beam, struck him on the head, and knocked him partly under the wheels.

Notwithstanding the company's exclusive right to the use of its roadway, it is still bound to use ordinary care to avoid injury to persons who may be upon or near its track. What is ordinary care is to be measured, not only by the dangerous forces put in motion, but by the special circumstances of the time and place; running along a line within the city limits, more or less thronged with pedestrians, requiring a higher degree of care than when in the open country, with a presumably clear track. *Shearm. & Redf. on Neg.*, § 477.

Under the facts as testified to by the plaintiff, there was a question, whether there was not a want of ordinary care, on the part of the defendant, in running its freight train backward within the city limits, with many pedestrians passing along the side of its track, to and from the fair, at the rate of speed testified to, with a beam projecting a foot and a half beyond the side of the car, without lookout, brakeman or signal to give notice or warning, and this question was properly submitted to the jury.

The question of contributory negligence on the part of the

plaintiff was also a question for the jury, to be by them determined in view of all the circumstances of the case.

Being situated as he was, the plaintiff was bound to the exercise of peculiar care and caution to keep out of the way of the defendant's trains; but was he bound to anticipate a departure from the usual mode of loading freight cars, and be on the watch for beams projecting beyond the sides of the cars? He saw the freight train, but supposed it going in the other direction or standing still. Did not the act of the defendant in running its train backward, without lookout or signal on or from the train, contribute to mislead him? These were questions for the jury. The motion for nonsuit was properly overruled.

The fourth and sixth assignments of error are not well taken. In the one case the evidence went to the jury notwithstanding the objection sustained by the court. In the other the evidence offered was not competent.

It remains for us to examine the instructions of the court.

The objection made by the appellee, that the exceptions to the giving and refusing instructions by the court are to the instructions *en masse*, is well founded as to the instructions *given* by the court, but not as to the instructions *refused*. The instructions given are in the nature of a general charge to the jury, and cover three printed pages of the abstracts. "To the giving of which instructions, and each and every of them, the defendant, by its counsel, then and there excepted." This presents a different question from that passed upon in the case of *Webber v. Emmer-son*, 3 Colo. 248. That was the case of a general exception to "said instructions."

When the instructions given by the court are in the nature of a general charge, excepting to "each and every" of the instructions will not avail.

The rule is founded upon the proposition, that it is the duty of counsel to call the attention of the court trying the cause, particularly to the error complained of, that there may be an opportunity to correct it. This is due to the court and a fair administration of justice.

In the case of *Jones v. Osgood*, 2 Seld. (N. Y.) 235, an exception "to the whole charge and every part of it," was held bad. Justice Johnson says: "The exceptions taken did not call the attention of the judge to the points which were claimed to be erroneous. They did not suggest to his mind what the counsel

excepting would have him hold wherein his charge was wrong. If the counsel had presented to the judge the two distinct points which he makes here we cannot say how he would have disposed of them. It has been held, in many cases, that the party complaining of the charge of the judge must put his finger on the point of which he complains. If he does not do so no court of review can regard it."

The exception under consideration can have no greater force than a general exception to the entire charge of the judge. It cannot be said that the charge in this case contains no single correct proposition of law; on the other hand, although we are not called upon to inquire, we regard it as substantially correct. The rule laid down in the case of *Webber v. Emmerson* must be applied as though the exception had been, in terms, general. It would follow that instructions of like character, *refused* and excepted to in like manner, would not be the subject of review in this court, if any one proposition of law contained therein was properly refused. The instructions, however, *refused* by the court in this case do not come within the rule. They are a series of separate and distinct propositions of law, each standing independent and alone, and against each of which the court was enabled to write on the margin the words "given" or "refused," as required by section 28 of chapter 70 of the Revised Statutes. They each enunciated some rule of law which the appellant claimed at the trial should be given. As it was necessary for the court to either give or refuse them separately, each particular proposition was, therefore, called to the attention of the court. *Davenport Gas-light, etc., Co. v. City of Davenport*, 13 Iowa, 237. Such being the fact the exception "to the ruling of the court in refusing to give the said instructions, and each and every of them," was sufficient.

It is true the instructions are not numbered, as good practice requires; and it is perhaps well to observe in this connection that failure in this particular is the source of great trouble and annoyance to this court, as well as to all who have to do with the case. Where the instructions are in the nature of a general charge to the jury it is but fair to counsel and litigating parties that they be submitted to counsel, that an opportunity may be had to examine them and except to such portions as they deem objectionable.

Considering the instructions in the order in which they stand,

the first was properly refused. The locality of the accident was fixed by the evidence at a point where there was no public highway or crossing, and it was not necessary for the jury to indulge in any presumption concerning it. The right of property was a matter to be proved like any other fact; there was no presumption of law that it was in the defendant.

The second, third and fourth instructions were substantially embraced in the instructions already given by the court.

The fifth instruction was also properly refused, as it took from the jury the question of negligence respecting the manner in which the car of the defendant was loaded.

We find no error in this case which calls for a reversal. The evidence on the part of the defense, it is true, is in direct contradiction of the testimony of the plaintiff; but the jury evidently accepted the testimony of the latter as true. It is not for this court to say it was not true. The credibility of witnesses is for the determination of the jury; and an appellate court is not at liberty to interfere, except when the verdict is not supported by the evidence. *Taylor v. Randall*, Special Term, 1877.

The judgment of the court below is affirmed with costs.

DENVER AND RIO GRANDE RAILROAD COMPANY v. RYAN.

Supreme Court, Colorado, September Term, 1891.

[Reported in 17 Colo. 98.]

MUNICIPAL ORDINANCES REQUIRING RINGING OF LOCOMOTIVE BELL AT CROSSINGS, REASONABLE — FAILURE TO OBSERVE ORDINANCE, NEGLIGENCE. — Municipal ordinances requiring the ringing of the locomotive bell whenever a steam engine is approaching or crossing a public street, and requiring the presence of a flagman at important crossings, to the end that people may be suitably and seasonably warned of the approach of railroad trains, are reasonable and proper regulations and it is the duty of railroad companies to faithfully observe such ordinances, and failure to comply with such ordinances is negligence (1).

1. *Violation of ordinances relating to ringing of bells and giving of other signals, etc., at railroad crossings, evidence of negligence.* — See *Western R'y Co. v. Sistrunk*, 85 Ala. 352; *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522; *Kenney v. Hann., etc., R. R. Co.*, 105 Mo. 270; *Lane v. Atlantic Works*, 111 Mass. 136; *Jetter v. Harlem R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *McGrath v. Northern Pac. R. R. Co.*, 63 N. Y. 522; *East Tenn., etc., R. R. Co. v. Winters*, 85 Tenn. 240; *San Ant., etc., R. R. Co. v. Bowles*, 88 Tex. 634; *Peyton v. Tex.*,

LOOKING AND LISTENING — CONTRIBUTORY NEGLIGENCE. — It is negligence and carelessness for a person to go, stand, or be upon the track of a railroad without keeping watch both ways for trains; and it is the duty of a person going upon a railroad track to look and listen for the approach of trains and observe the surroundings, and a failure so to do is negligence.

NEGLECT — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

— In an action for negligence the plaintiff is not entitled to recover unless the negligence of the defendant be affirmatively established by a preponderance of the evidence; and where a defendant relies upon the contributory negligence of the plaintiff as a defense, such contributory negligence must be shown by a preponderance of the evidence or the defense will be unavailing.

APPEAL from judgment for plaintiff in District Court of Arapahoe County. *Judgment affirmed.*

“ This action was brought by Mary Ryan, plaintiff below, to recover damages for the death of her husband, Patrick Ryan. In her complaint she alleges that on September 17, 1889, her husband was run over and killed by an engine and tender of the defendant, the Denver and Rio Grande Railroad Company, and that his death was so occasioned by the negligence of the defendant in operating its railway train at the intersection of Larimer and Sixth streets in the city of Denver. The action is founded upon the act of March 7, 1877 — a statute so familiar that it need not be quoted at length. 1 Mills' Annotated Statutes, 1003.

“ The following ordinances of the city of Denver were set forth in the complaint and shown to be in force at the time of the accident: ‘ It shall be the duty of the engineer, or other person in charge of any locomotive engine within the city of Denver, on approaching any public crossing, street or highway, to ring the locomotive bell sufficiently loud to warn all persons of the approach of such locomotive engine, and shall continue to ring such bell until such locomotive engine and train of cars shall have cleared such crossing. For every violation of this section, the offender shall, upon conviction, be fined in a sum not exceeding

etc., R. R. Co., 41 La. Ann. 861; Massoth v. Del., etc., Canal Co., 64 N. Y. 524; Faber v. St. Paul, etc., R. Co., 29 Minn. 465; Chicago, etc., R. Co. v. Starmer, 26 Neb. 630.

In commenting upon the *dictum* in Brown v. Buffalo & State Line R. R. Co., 22 N. Y. 191, to the contrary effect (that violation of ordinances, etc., is not competent evidence of negligence),

Shearman & Redfield, in their work on Negligence (5th ed.), § 467, vol. 2, p. 799, note 2, say: “ This decision, which was rendered by a bare majority of the court, three judges dissenting, was justly condemned by Davis, J., in Jetter v. Harlem R. R. Co., 2 Abb. Ct. App. Dec. 458. It is now completely overruled. Massoth v. Del., etc., Canal Co., 64 N. Y. 524.”

one hundred dollars for each and every offense.' 'All railroad companies whose tracks cross Larimer, Holliday and Seventh streets shall be required to keep a flagman at said crossings, whose duty it shall be to warn people of the approach of trains by waving a red flag at the time of the approach of any train or engine, so as to fully protect the public in their persons and property.' Plaintiff recovered a verdict and judgment, and defendant brings this appeal."

WOLCOTT & VAILE and H. F. MAY, for appellant.

SULLIVAN & MAY and S. L. CARPENTER, for appellee.

Elliott, J.—The assignments of error sought to be maintained on this appeal relate mainly to the instructions given, refused and modified. Of these in the reverse order.

1. Railway companies engaged in propelling locomotive engines and trains through large cities and thickly-settled towns are bound to exercise all reasonable care and diligence to avoid injury to persons traveling upon the public streets intersected by such railroads. The care and diligence should be proportionate to the increased dangers and risks occasioned by such occupation of the public streets. In addition to the diligence which the common law exacts in such cases, local statutory regulations may be resorted to for the better protection of the public safety. Municipal ordinances requiring the ringing of the locomotive bell whenever a steam engine is approaching or crossing a public street, and requiring the presence of a flagman at important crossings, to the end that people may be suitably and seasonably warned of the approach of railroad trains, are reasonable and proper regulations; and it is the duty of railroad companies to faithfully observe such ordinances. The District Court did not err in modifying defendant's request to charge the jury upon this subject. The evidence tended to show that Ryan was attempting to cross the public highway diagonally at the intersection of Sixth and Larimer streets at the time he was struck by the engine; so he might have been warned and protected if the bell had been rung, or if the flagman had been present, as the ordinances provide. It was properly left to the jury to determine from the evidence whether the locomotive bell was or was not rung; also whether the flagman was or was not present at or immediately before the happening of the accident. So, too, the jury were correctly charged that, if they were satisfied from the evidence that the defendant company had failed to comply with

said ordinances, or either of them, at the time of the accident, such failure was negligence on the part of the defendant. But it was not in any manner indicated by the charge of the court that such negligence, if found to exist, was conclusive of the defendant's liability in the action. Proof of such negligence would not suffice to make the defendant liable, unless it was also shown to be the proximate cause of the death of the plaintiff's husband, Patrick Ryan; and not then if the evidence also showed that Ryan's own negligence contributed to cause his death. Such was, in substance, the charge of the court. *Shearm. & Redf. Neg.*, § 13; *Whart. Neg.*, § 798; 2 *Thomp. Neg.* 1232; *Behrens v. K. P. R'y Co.*, 5 *Colo.* 403; *Jackson v. Jackson, Receiver, D. & R. G. R'y Co.*, 16 *Colo.* 103; *Briggs v. N. Y. Cent., etc., R. Co.*, 72 *N. Y.* 30; *Siemers v. Eisen*, 54 *Cal.* 413 (1); *Bott v. Pratt*, 33 *Minn.* 323. While the law is thus stringent in imposing duties and responsibilities upon railroad companies, it is not less exacting in its requirements of individuals or natural persons. The learned judge who presided at the trial very properly charged the jury that "as a matter of law, it is negligence and carelessness for a person to go, stand, or be upon the track of a railroad without keeping watch both ways for trains;" and further, that it was the duty of Ryan, in going upon the track of the defendant company, "to look and listen for the approach of trains, and observe the surroundings," and that, if he failed so to do, it was negligence on his part. *Holmes v. Colo. Cent. R. R. Co.*, 5 *Colo.* 197, 516(2); *Fletcher v. Fitchburg R. R. Co.*, 149 *Mass.* 132; *Chicago, R. I. & P. R. R. Co. v. Houston*, 95 *U. S.* 702, 7 *Am. Neg. Cas.* 345; *Aiken v. Penn. R. R. Co.*, 130 *Pa. St.* 380; *Kennedy v. D. I. P. & P. R'y Co.*, 10 *Colo.* 495.

2. The defendant's counsel requested the court to instruct the jury to the effect that the burden of proof devolved upon the plaintiff to show affirmatively that the killing of Ryan was caused by the negligence of the defendant, and also that the burden of proof was upon plaintiff to show affirmatively that the accident which caused Ryan's death was not the result of contributory negligence or want of reasonable care and caution on his part; and that, if plaintiff failed to thus prove either of said facts, the jury must find for defendant. The refusal of the court to give such instruction is assigned for error. Upon the first proposition

1. See case of *Siemers v. Eisen*, 54 *Cal.* 413, cited on page 189, *ante*.

2. See abstract of the *Holmes* case on page 227, *ante*.

embraced 'in the instruction thus prayed there is no controversy. It is well established that in a case of this kind the plaintiff is not entitled to recover unless the negligence of the defendant be affirmatively established by a preponderance of the evidence. Upon principle it would seem that there should be no controversy as to the second proposition embraced in said instruction, but unfortunately there is great conflict of authority upon the subject. 2 Thomp. Neg. 1175. We shall not undertake to reconcile conflicting decisions, but will briefly state our own views, and for convenience will use the term "plaintiff" as in a case where the action is brought in the name of the party injured. To our minds it seems plain that there is no essential difference between the negligence of a defendant which may render him liable in an action of this kind and the contributory negligence of a plaintiff which may relieve from such liability. The very phrase "contributory negligence" implies that the latter is of the same intrinsic nature, and contributes to cause the same effect, as the former. In the absence of evidence, direct or circumstantial, the law never presumes any party to have been guilty of negligence. On the contrary, it presumes every one to have been diligent, or free from negligence, until negligence is affirmatively shown. This presumption of diligence or of freedom from negligence attends both plaintiff and defendant. Hence, to warrant a verdict against the defendant on the ground of his negligence, the law requires that his negligence shall be affirmatively shown by a preponderance of the evidence; and in like manner, to warrant a verdict against the plaintiff on the ground of his contributory negligence, the law requires that his contributory negligence shall be affirmatively shown by preponderance of the evidence. On the one side, the negligence of the defendant is relied on as the gist of the action; on the other side, the contributory negligence of the plaintiff is relied on as the gist of the defense. It is true, the complaint in an action for negligence usually contains the averment that the plaintiff, "without any fault or negligence on his part," was injured by reason of the negligence of the defendant. In consequence of this negative averment it has been supposed that the plaintiff must offer some affirmative evidence of the absence of negligence on his part in the first instance. But this does not follow. The negative averment, even if necessary, — a point we do not decide, — serves substantially as a plea of not guilty to any counter charge of contributory negligence which may

be made by defendant. In the absence of evidence of defendant's negligence, the defendant is saved from defeat. So, in the absence of evidence of plaintiff's contributory negligence, the plaintiff is saved from defeat on that ground. Perhaps the matter may be stated more clearly and logically thus: As the absence of evidence tending to show defendant's negligence leaves the charge of negligence unsustained against defendant, so the absence of evidence tending to show plaintiff's contributory negligence leaves the counter charge of contributory negligence unsustained against the plaintiff. It sometimes happens that evidence tending to show contributory negligence on the part of plaintiff may be elicited from his own witnesses when giving their testimony in chief. In such case, unless such evidence be contradicted, or rebutted by counter evidence tending to show plaintiff's diligence or freedom from negligence, he should, of course, suffer defeat, either by nonsuit or by the verdict of the jury. But this does not affect the correctness of the rule that contributory negligence, the same as any other negligence, is a matter to be proved, and that, in the absence of evidence, it is not to be presumed. Hence, where a defendant relies upon the contributory negligence of the plaintiff as a defense, whether the averment in respect thereto appear negatively in the complaint or affirmatively in the answer, such contributory negligence must be shown by a preponderance of the evidence, or the defense will be unavailing. In general, from whatever source evidences of negligence or of contributory negligence may come, they are to be considered and weighed together, and the same quantum of proof will be required to establish one as the other. As the last part of the instruction requested by defendant as above stated was contrary to the views here expressed, it was not error to refuse it. *K. P. R'y Co. v. Twombly*, 3 Colo. 129; *Wall v. Livesay*, 6 Colo. 465; *City of Denver v. Dunsmore*, 7 Colo. 340; *Lord v. Pueblo S. & R. Co.*, 12 Colo. 393.

3 From the record it appears that no exception, objection, or suggestion of error of any kind was made at the trial in respect to the instructions given. We need not, therefore, consider the assignments of error based thereon. We are aware that the Code (§ 387) dispenses with the necessity of taking exceptions to the giving, refusing, or modifying instructions. The mere formal reservation of an exception by the defeated party was doubtless considered unimportant, and liable to be omitted through

inadvertence and so was dispensed with. But the statute does not do away with the reason or necessity for making objections in some appropriate way to instructions, in such time and manner as to give the trial court an opportunity to correct the same if found erroneous. Any judge, in the hurry of a *nisi prius* trial, is liable to err, unless aided by the vigilance of counsel. From time immemorial it has been a well-recognized and most salutary rule of the common law that, if counsel neglect to object or to point out errors occurring at the trial in such time and manner as will give opportunity for their correction, they will not, in general, be heard to complain of such errors in a court of review. This rule is so reasonable and so essential to the administration of justice that we cannot believe it could have been the intent of the legislature to overthrow it altogether. Any other rule would enable a party to sit silently by, knowing that some error had been committed against his interest, of which perhaps no other person was aware at the time, and thus take the chances of a verdict in his favor, while having the sure means of setting aside the verdict if it happened to be against him. The law in this jurisdiction never has permitted, and it is to be hoped that it never will permit, such experiments with judicial proceedings. There will always be enough important questions to review in the appellate courts if parties are required to be vigilant to prevent error in the trial courts. 2 Thomp. Trials, § 2394; *Union Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *McFeters v. Pierson*, 15 Colo. 207; *Wray v. Carpenter*, 16 Colo. 271. Where instructions are prayed, and either refused or modified, the foregoing observations are not so clearly applicable. It is gratifying in the present case to know that the instructions given seem to be full and complete, and in all substantial respects fair towards the defeated party. The record clearly shows that the instruction concerning the measure of damages was given at defendant's request. This furnishes an additional reason why the assignment of error based thereon cannot be considered. In view of the amount of the verdict, the instruction, even if erroneous, — which we do not intimate, — could not well be considered prejudicial to defendant. A careful examination of the record discloses no substantial or reversible error. The evidence being conflicting upon the material matters in controversy, this court cannot properly disturb the verdict.

The judgment, therefore, must be affirmed.

COLLISION BETWEEN TRAIN AND TEAM AT CROSSING — FAILURE OF TRAIN TO SIGNAL DOES NOT EXCUSE CONTRIBUTORY NEGLIGENCE. — In **CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. v. CRISMAN**, 19 Colo. 30 (1893), collision between train and team at railroad crossing, it was held that negligence on the part of a railroad company will not excuse a traveler from exercising proper care to avoid danger at crossing, and there can be no recovery for failure to exercise such care, if such failure contributes to the injury. Such degree of care required of a traveler at a crossing is measured by the conditions surrounding the place of crossing. It was also held that failure to give signal of approaching train does not render railroad company liable for accident at crossing, unless such failure is proximate cause of the injury. Judgment for plaintiff reversed for erroneous instruction as to failure to give signal and running train at rapid rate of speed. **GODDARD, J.**, discussed the points fully and cited many authorities.

CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. v. NUNEY, 19 Colo. 36 (1893), was an action arising out of the same facts as in **Chicago, R. I. & P. R'y Co. v. Crisman**, 19 Colo. 30 (see preceding paragraph), and judgment was reversed on the grounds set out in the **Crisman Case**, *supra*.

COLLISION BETWEEN TRAIN AND WAGON AT CROSSING — DUTY OF TRAVELER. — In **DENVER & RIO GRANDE R. R. CO. v. GUSTAFSON**, 21 Colo. 393 (1895), where plaintiff was struck by defendant's train as he was driving over defendant's crossing, judgment for plaintiff for \$3,000 was reversed for erroneous instructions as to plaintiff's duty when crossing track. It was held (*per CAMPBELL, J.*), that "the care which a railroad company whose road crosses the public highway must exercise in running its trains at such a place depends generally upon the facts and circumstances of the particular case. The care increases as the danger does. A corresponding duty is upon a traveler who attempts to cross at such a place. His care is in proportion to the danger. **Railway Co. v. Crisman**, 19 Colo. 30 (see this case in preceding paragraph). In the case at bar, the plaintiff's team was standing, but before he started to cross the track he neither looked nor listened, but relied solely upon the flagman. We cannot say, as a matter of law, that the plaintiff in such a case may rely solely upon the flagman; neither can we say, as a question of law, that his failure to look or listen was not contributory negligence. It is a question of fact, to be determined by the jury, whether or not a

plaintiff may rely solely upon the flagman, or whether he is excused from the exercise of any additional precaution on his part in these circumstances." * * * "It is true that following the orders of a flagman is an exercise of some care, but it is for the jury to determine whether it is the whole duty of the plaintiff as the exercise of that reasonable care which is demanded under the circumstances of the case." * * * Judgment reversed.

DYSON, ADM'R, V. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Supreme Court, Connecticut, January, 1889.

.[Reported in 57 Conn. 9.]

COLLISION BETWEEN TRAIN AND OMNIBUS AT GRADE CROSSING — SPEED OF TRAIN NOT NEGLIGENCE. — In an action to recover damages for the death of plaintiff's intestate caused by one of defendant's passenger trains running into an omnibus which was being driven by the intestate over a grade crossing, it appeared that the train was running at a speed of thirty-five to forty miles an hour; that the crossing was within the limits of the city and the highway much frequented, but was not surrounded by a thickly-settled neighborhood; that the railroad approached the crossing upon a curve, and a traveler could not see a train approaching for a distance of 200 feet from the crossing, the view being obstructed by intervening buildings, fences, foliage, etc., and an engineer could not see a traveler approaching until the engine was within twenty feet of the crossing; that the city, although authorized by its charter to do so, had not limited the speed of trains at the crossing. *Held*, that the railroad company was not negligent by reason of the rate of speed which was maintained at the crossing; as a general rule, negligence cannot be inferred from speed alone.

SIGNALS AT CROSSINGS — STATUTE. — Where a railroad company had complied with the statutory requirements in sounding the bell and whistle of the engine as the train approached the crossing, it was not negligent in not providing at the crossing additional signals to those required by statute.

TRAVELERS AT RAILROAD CROSSINGS — DUTY OF ENGINEER. — Where it appeared that the fireman first saw the omnibus approaching at some distance from the crossing but did not tell the engineer until it was again seen near the crossing, the railroad company was not liable because the fireman did not sooner tell the engineer of the approach of the omnibus. No general duty rests upon the engineer in respect to a traveler whom he sees approaching a crossing, and none upon the fireman. Ordinarily the engineer has a right to assume that the traveler will regard the signals if they have been given, and is only called upon to act when the traveler is so near the crossing as naturally to startle him by a sense of danger.

PHOTOGRAPHS — EVIDENCE. — Photographic sketches of the scene of the accident properly admitted in evidence.

“ACTION to recover damages for the death of the plaintiff's intestate through the negligence of the defendant, a railroad company, in the running of one of its trains; brought to the Superior Court in Hartford county, and heard in damages after a default by Sanford, J. The following facts were found by the court.

“The defendant company, on the first day of October, 1885, was engaged in the general railroad passenger and freight business between Waterbury in this State, and Boston in the State of Massachusetts. Its line of railroad runs through the city of New Britain. On that day and previous thereto John B. Dyson was the owner of a line of omnibuses, and carried passengers for hire from a point about a mile from the center of the city into the city and from the city back. On the morning of that day a passenger train running over the defendant's road from Waterbury easterly, to and through New Britain, came into collision with one of Dyson's omnibuses drawn by two horses at what is known as Black Rock crossing, which is a grade crossing on West Main street in the city, and over which the omnibus and horses were going on one of their regular trips to the center of the city. The horses were being driven at the time of the collision with the knowledge and authority of Dyson by the intestate, his son, seventeen years of age, who was, and for a considerable period had been, the regular driver of the team; and inside the omnibus, the entrance to which was by a door at the rear end, were his two sisters, aged fifteen and thirteen years respectively, who were on their way to school. By the collision all three children were killed, one of the horses was killed, the omnibus destroyed, and some damage done to the harnesses. This suit is brought by the administrator of Charles Dyson, to recover damages for the injuries resulting in his death, and two other suits were brought against the defendant by the administrator of the other two children for injuries resulting in their deaths, and a suit was also brought by John B. Dyson, individually, to recover damages for the injuries to his horse, omnibus and harnesses. All the cases having been previously defaulted, were by agreement heard and considered together upon the question of damages.

“Black Rock crossing is just within the limits of the city on West Main street. This street is a main thoroughfare leading westerly from the city, and is much frequented, not only by the residents of the town and city of New Britain, but by travelers

between the towns of New Britain, Plainville, Forestville, Farmington, Bristol and Southington. The railroad approaching the crossing from the west runs upon quite a curve and passes through a series of three cuts ranging in height from four feet to seven and one-half feet. A traveler approaching the crossing on the highway from the west could not, at the time of the collision, for a distance of two hundred feet from the crossing, see a train approaching from the west until he reached the company's right of way, the view being obstructed by intervening buildings, fences, banks, foliage and herbage. An engineer approaching the crossing from the west, could not from his post on the engine at the time spoken of, see a traveler approaching the crossing from the north until his engine was within about twenty feet of the crossing, and until too late to do anything to avert a collision between his engine and the traveler. The highway met the tracks at an angle of about forty-five degrees. The crossing was not protected by a flagman, gate, or electric bell, nor by any means whatever save the ordinary warning boards by the side of the road. On the morning in question the train from Waterbury to Hartford left Plainville, the next station west of New Britain, at 8:27 o'clock. The time for leaving Plainville according to the schedule was 8:15 o'clock, but owing to making connections at Plainville with the Canal road, the morning train to Hartford frequently did not leave Plainville till some minutes after the schedule time. The schedule time for the train to leave New Britain was 8:30 o'clock, but if it could reach New Britain as soon as 8:39 o'clock it had the right of way. From a point about one-half mile west of Black Rock crossing the grade begins to descend, and descends at the rate of forty feet in a mile to the New Britain station. The crossing is about a mile from the New Britain station. At the time of the collision the train was running from thirty-five to forty miles an hour and the engineer did not see the omnibus and horses until he was within about twenty feet of the crossing. He then applied his air-brakes and as soon as possible reversed his engine and sanded the track, but nothing that he did or could do at the time he first saw the omnibus was effectual to avert the collision or perceptibly to diminish the speed of the train until after the collision had occurred. The train did not come to a stop until it had gone 2,175 feet beyond the crossing. The engineer had frequently been over this crossing, and he knew there were no danger signals there except as

above stated, and that he could not, from his post upon the engine, see a traveler approaching the crossing from the north until the engine was about twenty feet from the crossing. The fireman upon the engine saw some portions of the approaching omnibus when he was about six hundred feet from the crossing, but he did not call the attention of the engineer to it until just before the collision and until too late to avert it. The bell and whistle of the engine were sounded in the usual and regular manner upon approaching the crossing, and the bell was ringing up to the time of the collision.

“ John B. Dyson’s house was on the road leading to the crossing, and about three hundred feet north of it. The leaving time for the omnibus to make one of its regular trips that morning was 8:30 o’clock. At the leaving time the intestate was upon the omnibus in the highway, the girls were inside and the horses were at a standstill. Then he started along at a slow trot. The team was seen only immediately after starting and just before reaching the crossing. The proper place after starting for the driver to have stopped was in the interval when he was unseen and just before he was next seen, which was when he was descending the grade towards the track, the horses going a little faster than a man would walk, he holding a line in each hand, his whip in his right hand and his right foot on the brake of the omnibus. For the first one hundred feet north of the track the highway rises at a grade of five and twelve-hundredths feet. The collision occurred at 8:34 o’clock.

“ John B. Dyson, the father, having testified that Charles had been accustomed to drive and care for horses from an early age; that he had driven this omnibus for several weeks, making fourteen trips daily over the route; that he was a strong young man, and that he, the father, had often ridden with him and observed his management of horses and of the team that he was driving at the time of the collision, was then asked what sort of a driver Charles was, and replied that he was a careful driver. To this question and answer severally the defendant objected as irrelevant and calling for a matter of opinion, but the court admitted them, the defendant excepting. Similar testimony was received against like objection and exception from John A. Andrews, Charles E. Hart, and David Doolittle. As above stated, all four cases were heard together, and in interposing the objections the defendant made no distinction between the cases.

“The plaintiff offered various photographs taken a year or more after the accident as representations of the *locus in quo*. The introduction of these photographs was accompanied by the evidence of the photographer who took them as to their accuracy, and of a surveyor who identified the points of view. The *locus in quo* remained unchanged (with the exception of an addition to a building, which was fully explained to the court), during the time intervening between the accident and the taking of the photographs, but the latter were taken in the winter season. To their introduction in evidence the defendant objected on the ground that they were not primary evidence or from their nature competent evidence, and that such evidence was misleading, immaterial and irrelevant; but the court admitted them, the defendant excepting.

“It was found that the collision was caused by the negligence of the defendant company, and that there was negligence on its part in running its train on the morning in question at such a high rate of speed over a crossing which was specially dangerous, and that there was also negligence on the part of the fireman in not sooner calling the attention of the engineer to the presence of the approaching omnibus, and that there was no contributory negligence on the part of the plaintiff's intestate, the driver of the vehicle.

“It was also found that there was negligence on the part of the defendant in not protecting the crossing by a flagman, gates, or some danger signals other than those that were employed, in view of the high rate of speed at which it customarily ran its trains over the crossing.

“Upon these facts the court assessed the damages at seven hundred and fifty dollars. The defendant appealed.” *Judgment reversed.*

S. E. BALDWIN and E. D. ROBBINS, for appellant.

C. E. MITCHELL and F. L. HUNGERFORD, for appellee.

Beardsley, J.—The superior court finds that the collision which caused the death of the intestate was produced by the negligence of the defendant company, and has detailed the facts, and presumably all the material facts, upon which it formed that conclusion. The question presented by the second assignment of errors is whether these facts are legally sufficient to justify the finding of negligence. Such negligence is found to consist of a violation of duty by the defendant in three particulars: First, in

running its train at so high a rate of speed over the crossing in question; second, in not protecting the crossing by a flagman, gates, or some danger signal other than those which were employed; and, third, that the fireman on the train was negligent in not calling the attention of the engineer to the approaching omnibus.

Was the defendant company negligent by reason of the rate of speed which was maintained at the crossing? The crossing is just within the limits of the city of New Britain, and the highway which forms it is much traveled, but we infer from the finding, and especially from the photographic sketches of the locality, that it was not surrounded by a thickly-settled neighborhood. The train in question was running at a rate of speed which, though high, cannot at the present day, be regarded as excessive for a fast passenger train, and we infer, from the finding, that trains "customarily run over the crossing at a high rate of speed," that it was not unusual. The city of New Britain had made no order limiting the speed of trains at the crossing, though authorized by its charter to do so. We think that the court below erred in its conclusion that it was the legal duty of the defendant company to slacken the speed of its train. As a general rule, negligence cannot be inferred from speed alone. In the case of *Warner v. N. Y. Central R. R. Co.*, 44 N. Y. 465, the law is thus stated: "The law places no restrictions upon the rate of speed at which the trains may be run across the country, at the crossings of the highways or elsewhere; nor is the train required to stop or reduce the speed at such places; nor does the law subject the railroad company to liability for damages occurring from the rate of speed, if the signals required by law are observed." To the same effect are *Telfer v. Northern R. R. Co.*, 30 N. J. Law, 188, 192; *Chicago, B. & Q. R. R. Co. v. Lee*, 68 Ill. 576; *Chicago, B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88; *Grows v. Maine Central R. R. Co.*, 67 Me. 100 (1).

1. *Speed of train.* — In addition to the cases cited in the opinion of the case at bar, as to rate of speed of train being negligence, see *McKonkey v. Chicago, etc., R. R. Co.*, 40 Iowa, 205; *Powell v. Mo. Pac. R. R. Co.*, 76 Mo. 80; *Omaha, etc., R. R. Co. v. Krayenbuhl*, 48 Neb. 553; *Maginnis v. N. Y. Cent. R. R. Co.*, 52 N. Y. 215; *Central Ohio*

R. R. Co. v. Lawrence, 13 Ohio St. 66; *Doggett v. Richmond, etc., R. R. Co.*, 81 N. C. 459; *McDonald v. Internat., etc., R. R. Co.*, 86 Tex. 1; *N. Y., Phila., etc., R. R. Co. v. Kellam*, 83 Va. 851; *Johnson v. Chesapeake, etc., R. R. Co.*, 91 Va. 171; *Heath v. Stew-art*, 90 Wis. 418.

It is found that the crossing was especially dangerous. It was undoubtedly so, as compared with those where the traveler upon the highway has a continuous view of the approaching train for a considerable distance. The fact that the view was intercepted for the distance of 200 feet on the highway, until the approaching train was within twenty feet of the crossing, and that the railroad curved as it approached the crossing, were elements of danger to the traveler upon the highway. The habits of men are such that all crossings of highways by railroads at grade are practically dangerous, and it is the policy of the state to abolish them as fast as is practicable. The danger arises mainly from the forgetfulness of the railroad employees or the inattention or temerity of the traveler upon the highway. This danger is obviously diminished where the conditions are such that the traveler is not required to rely upon the danger signals, but can see the approaching train in time to avoid it, and the engineer can see an object at the crossing in time to effectually reduce the speed of his train before reaching it. But such conditions are hardly the more common ones at railroad crossings in this State. In many, if not in most, cases, the traveler must rely for his safety upon the danger signals. In the present case they were given as required by the statute, and, so far as appears, there was nothing to materially obstruct their sound. The cuts, from four to seven and a half feet high, through which the train ran as it approached the crossing, could hardly have this effect, as in ordinary locomotives the whistle and bell are higher than that from the track. The highway was much traveled by inhabitants of New Britain and adjoining towns. It seems highly probable that if a diminished speed at this crossing was essential to the safety of travelers in the exercise of due caution, the city of New Britain would have demanded it. A rule requiring trains to so reduce their speed before coming in view of all crossings where the conditions are similar to those of this one, as to avoid collision with an object at or near the crossing, would seriously incommode the public, and be unnecessary for travelers exercising proper care. Doubtless in some cases the company might be liable for the neglect of the engineer to slacken the speed of his train, if by doing so he might have avoided a collision; as, if he was informed that a person was approaching a crossing in such a condition or under such circumstances as to indicate that he was heedless of the danger signals; or if other sounds were prevailing, as of a

thunder storm, which might render the sound of the signals indistinguishable. In such cases the company might properly be charged with the consequences of the personal negligence of the engineer. Nor do we think that the defendant was guilty of negligence in not providing at the crossing additional signals to those required by statute. In this State the legislature has assumed the regulation of this matter by providing specifically what signals shall be given of the approach of trains to crossings, and by instructing the railroad commissioners to require other signals at crossings when they shall deem them necessary for the protection of the public. This legislation is exhaustive, and defines the whole duty of railroad companies in the matter to which it relates. *Weber v. N. Y. Central R. R. Co.*, 58 N. Y. 451; *Pakalinsky v. N. Y. Central R. R. Co.*, 82 N. Y. 424; *Sate v. Phila., Wilm. & Balt. R. R. Co.*, 47 Md. 76; *Haas v. Grand Rapids & Indiana R. R. Co.*, 47 Mich. 401; *Cliff v. Midland R'y Co.*, L. R. 5 Q. B. 264 (1).

Nor do we think that upon the facts found the company should be held liable because the fireman did not sooner tell the engineer of the approach of the omnibus. No general duty rests upon the engineer in respect to a traveler whom he sees approaching the crossing, and of course none upon the fireman. Ordinarily he has a right to assume that he will regard the signals if they have been given, and is only called upon to act when the traveler is so near the crossing as naturally to startle him by a sense of danger. The distance of the omnibus from the crossing when seen by the fireman is not found distinctly, but the inference from the finding is that it was at least 200 feet, as it is found that

1. In *Cliff v. Midland R'y Co.*, L. R. 5 Q. B. 258, the facts were: C., while passing along an occupation road which crossed a railway on a level, was knocked down and injured by a train, owing, as was alleged, to the negligence of the railway company. There were gates across the road left unfastened, and the company had at one time kept a gate-keeper, but had ceased to keep one some time before the accident. About three years before the accident, the company had obtained powers under an act to make a new road and discontinue the level occupa-

tion road; the powers of the act were to be exercised within five years, and then to cease; and nothing had been done as to the road till after the accident. The jury negatived negligence in the driver of the engine; but found for the plaintiff on the ground generally of "negligence as to crossing." The judge in summing up, left to the jury, as evidence of negligence in the company, the omission to keep a gate-keeper, and the omission to exercise the powers of their act. *Held*, a misdirection.

for that distance the intestate could not see the train until he came to the company's right of way, and the engineer from his post on the locomotive could not see the omnibus. If this inference is the correct one, the lad must have driven rapidly from that point to the crossing, to have met the train, which was about 600 feet from the crossing when the fireman saw the omnibus, — much more rapidly than he was driving when he started or when he was last seen. But if the horses were driven for the 200 feet at the same rate as when seen by the witnesses, the probable distance of the omnibus from the crossing when the fireman saw it was about eighty feet. If this was so, we cannot say that he was in fault in not instantly calling the attention of the engineer to it. It is not unusual for prudent persons driving horses accustomed to trains to approach as near as or nearer than this to crossings when a train is about to pass. This view of the case renders it unnecessary to consider the other questions presented by the assignment of errors.

We refer, however, to the objection made by the defendant to the photographic sketches offered in evidence by the plaintiff, as it presents a question of evidence which has not hitherto been passed upon by this court. The court properly overruled the objection. The pictures represented the crossing in question and its surroundings, and presumably the court below found that it was a correct representation of them. The change in the appearance of the locality made by the falling of the leaves from the trees was, of course, open to explanation. *Marcy v. Barnes*, 16 Gray, 161; *Randall v. Chase*, 133 Mass. 210; *Ruloff v. People*, 45 N. Y. 213; *Church v. City of Milwaukee*, 31 Wis. 512; *Abb. Tr. Ev.* 102.

There was error in the judgment appealed from, and it is reversed. In this opinion the other judges concurred.

DRIVING ACROSS RAILROAD TRACK AT CROSSING — FAILURE TO LOOK AND LISTEN FOR TRAIN — PERSON JUMPING FROM VEHICLE TO AVOID DANGER — RAILROAD COMPANY NOT LIABLE — NOMINAL DAMAGES. — In *PECK v. NEW YORK, NEW HAVEN AND HARTFORD R. R. CO.*, 50 Conn. 379 (1882), accident at railroad crossing, it appeared that plaintiffs, husband and wife, sixty years old, drove a carriage along a street crossing a railroad track, in the early evening, at a time when a regular train was due, which plaintiffs knew,

having lived in the locality for about thirty years. On approaching the crossing they heard the train, and the wife asked the husband to look out for it, which could easily have been seen if they had leaned forward and looked. Before they reached the track the bell rang to close the gates, when the husband tried to stop the horse but was not able to do so, and one of the gates caught in the wheel of the carriage, which alarmed the wife, who jumped out and was injured. The train was not started until the carriage was safely across the track. If the wife had remained in the carriage she would not have been hurt. It was held that defendants were not liable for the wife's injury. *Held*, also, that plaintiffs were guilty of want of ordinary care in attempting to drive across the track when they knew, or could have seen by looking, that a train was near. The Court of Common Pleas was advised to render judgment for nominal damages only, namely, fifty dollars.

HORSE FRIGHTENED BY WHISTLE AT GRADE CROSSING — DUTY OF RAILROAD COMPANY AT SUCH CROSSINGS — INSTRUCTION. — In *BAILEY v. HARTFORD AND CONNECTICUT VALLEY R. R. CO.*, 56 Conn. 444 (1888), action for injuries sustained by plaintiff, who was driving on highway running parallel with railroad track, and whose horse became frightened by noise of train whistle at grade crossing, it was held (per ANDREWS, J.,) that "the law requires of the managers of railroad trains the utmost possible care for the safety of their own passengers. A section of the statutes directs with particularity what the engineer of a train must do when approaching a grade crossing. These are duties of the very highest nature. The duty which such managers are under to persons traveling with teams on a highway is a limited one at the most, and one that should never be permitted to interfere in the slightest degree with the higher duty they owe to their own passengers and to persons upon grade crossings. Under no circumstances are they required to exercise more than ordinary caution and care towards persons traveling on a highway. And in so deciding the Superior Court required of the defendant that which the law does not require." Judgment for plaintiff for \$2,000 reversed.

DUTY OF RAILROAD COMPANY AT GRADE CROSSING — STATUTE. — In *ROWEN v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.*, 59 Conn. 364 (1890), accident at railroad crossing, it was held that under ordinary circumstances, it was not the engineer's duty to both blow the whistle and ring the bell upon approaching a highway crossing at grade, but notwithstanding an order of the railroad commissioners dispensing with whistling, it

was the engineer's duty to blow the whistle if necessary to prevent accident, and if the exercise of reasonable care required it. Judgment for plaintiff for \$50, nominal damages, affirmed.

See also **BATES v. NEW YORK & NEW ENGLAND R. R. CO.**, 60 Conn. 259 (1891), person driving toward crossing killed by train by reason of horse being frightened at sight of locomotive and dashing across track, where a similar ruling as in the Rowen case (preceding paragraph), was made. Judgment for \$2,000 for plaintiff affirmed, but two out of the five judges dissented, on the ground of erroneous instructions as to negligence, they holding that it was a question for the jury.

ACCIDENTS AT CROSSINGS. — For other Connecticut cases relating to Accidents at Crossings, see *Andrews v. New York & New England R. R. Co.*, and *Smith v. Same* (three cases), 60 Conn. 293; *Pomponio v. New York, New Haven & Hartford R. R. Co.*, 66 Conn. 528; *Dundon v. New York, New Haven & Hartford R. R. Co.*, 67 Conn. 266; and *Murray v. Lehigh Valley R. R. Co.*, 66 Conn. 512 (passenger jumping from train to escape threatened collision with another train).

DARRIGAN v. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Supreme Court of Errors, Connecticut, October Term, 1884.

[Reported in 52 Conn. 287.]

ENGINEER INJURED IN COLLISION BETWEEN TRAINS — NEGLIGENCE OF TRAIN DISPATCHER — FELLOW-SERVANT — RAILROAD COMPANY LIABLE. — Where an engineer on one of defendant's trains was injured in a collision with another train of defendant's, and it appeared that the trains were run as directed by telegraph, and the collision occurred through negligent directions of a train dispatcher in defendant's division superintendent's office, it was held that the train dispatcher was not the fellow-servant of the engineer, and defendant was liable for the injuries sustained by plaintiff. *Held*, also, that the train dispatcher was acting in the place of the division superintendent, and as such represented the railroad company, and in telegraphing directions was performing an act which it was the duty of the company to do without negligence (1).

1. While this case relates to an injury to a railroad employee, and should more properly be classed with the Master and Servant cases, it is thought well to incorporate it with the Collision cases in this volume, as bearing on the question of fellow servant, the opinion discussing the same fully, which question will doubtless arise in several of the cases reported in this volume. See also *ZEIGLER v. DANBURY AND NORWALK R. R. Co.*, 52 Conn. 543,

ACTION to recover for an injury caused by the negligence of the defendants, a railroad company; brought to the Superior Court in Hartford county. The defendants suffered a default and were heard in damages before Stoddard, J. *Judgment affirmed.*

The following facts were found by the court:

"The defendant is a railroad corporation, operating a line of single-tracked road from Boston, Massachusetts, through the State of Connecticut, to the Hudson river. In the transaction of its business its line, at the time of the injury complained of, was divided into two divisions; the western division extended from Hartford to the Hudson river. In the organization of the corporation the general superintendence and control of its affairs was vested in a board of directors. The active management, superintendence, control and operation of the railroad was confided to a president, a subordinate to the president, and next in rank a general manager, then the division superintendents, who were responsible to and acted under orders from the general manager. The division superintendents employed and removed all train and yard men, and other employees on their several divisions, including train dispatchers and other telegraph operators.

"The railroad was run and the movements of trains directed and controlled by telegraph. Upon the western division three train dispatchers were employed, who were stationed at Hartford, and occupied the office of the division superintendent. One of the three was known as the chief train dispatcher. He had no other duties or powers than the other two. Each one of the train dispatchers was on duty for the term of eight hours in each day; and while on duty the powers and duties of all of the train

action by a brakeman for injuries sustained in a collision. The syllabus of the case states the facts as follows: "The Danbury and Norwalk and the Shepang railroads connected, forming a continuous line. By an arrangement between the two companies a train owned and run by the S. company went over both roads to a certain point and back daily, the D. & N. company paying the S. company monthly an agreed price for the service upon its road. The train when on the road of the D. & N. company was under its general con-

trol and governed by its rules, and it had entire control of the hands upon it, but the S. company was at liberty to use what engine and employ what hands it pleased. The plaintiff was a brakeman on this train, and was injured by a collision with a D. & N. train on its own road, caused by the negligence of the conductor of that train. *Held*, that the plaintiff was not an employee of the D. & N. company, and that the conductor of the other train was therefore not his fellow servant."

dispatchers were the same. The management of trains required on each train an engineer, fireman, conductor, and brakeman; and to transmit orders from the train dispatchers to the trainmen required telegraph operators stationed along the line of the road. Trains were made up by yard-men. Regular trains were run in accordance with a printed time schedule. Trains not running upon such schedule were special or irregular, and were run wholly by telegraphic orders. The engineers were furnished with a printed copy of the rules adopted by the company, in force at the time, and governing the running of trains.

“Among the rules governing ‘the movement of trains by special orders,’ rule seventy-seven is as follows: ‘*By whom orders shall be given.* All orders shall be given by a superintendent or by a dispatcher appointed for that purpose under direction of a superintendent; no other person will be allowed to give them. Only one dispatcher will be allowed to move trains on the same division at the same time.’ Another of the rules is as follows: ‘The head of each department is supreme authority in that department, and all orders must be issued through him, but in emergencies each employee must promptly obey the orders of any superior officer, making report thereof to the head of his department as soon as practicable.’ Another was as follows: ‘Division superintendents are supreme on their respective divisions, and are responsible only to the management for such orders as they may give, they will take care, however, not to give orders interfering with the general administration of any of the departments, nor in violation of the rules herein contained.’

“When a special train was made up and ready to start the yardmaster reported that fact to the division superintendent or to the train dispatcher on duty. Generally, but not invariably, the yardmaster so reported to the superintendent or chief train dispatcher. But in case the chief train dispatcher was not on duty, and the superintendent was not present, the yardmaster reported to the train dispatcher on duty, and such train dispatcher ordered out an engine, and controlled and directed the movements of the train by telegraphic orders. The business of the road was considerable, and varied from day to day, so that special trains were a necessity; it was not possible to know more than from six to twelve hours in advance how much freight would be received from connecting roads, as it was received without notice preceding its arrival.

“ On December 14, 1882, the plaintiff was a locomotive engineer employed by the defendant. On this day, while acting in this employment, he was injured by reason of a collision between the special train upon which he was then acting as such engineer, and a construction train running under orders hereinafter stated. The collision occurred near Union City, Connecticut, on the western division of the defendant's road. When the collision was imminent and unavoidable and his life in danger, the plaintiff jumped from his engine and was severely injured. He did not contribute by any negligence on his part to the injury, but in all respects acted as any prudent man would have done under like circumstances. The immediate cause of such collision was the conflicting orders given by the two train dispatchers set forth below.

“ On said December 14, 1882, at 12:04 p. m., J. W. Hyndman, chief train dispatcher of the defendant at Hartford, being then and there on duty, telegraphed to the conductor and engineer of the construction train which afterwards collided with Darrigan's train, an order which was recorded as follows on the official order book, the signatures of the conductors and engineers being also on that book:

“ ‘ 33 Hold No. 6 for orders, 33.
C. & E. No. 6, Eng. 125. } O. M.
Monahan & Engr., Eng. 80. } S. F.

“ ‘ 12.04 p. m.

“ ‘ Monahan and engineer, engine 80, will run to Towantic as a special train ahead of No. 6, engine 125, and can then work between Towantic and Waterbury as a special train until 6 p. m., and will protect themselves with flags against Goble special east, engine 106, after 1.30 this p. m.

“ ‘ Monahan, Richardson, 12 E. H.
“ ‘ Boughton, Allen, 12.40 p. m. J. W. H.’

“ Shortly after this order was given Hyndman was relieved by J. C. Stuart, one of the train dispatchers, who then went on duty. The above order, with the exceptions of the signatures of Richardson and Allen, and the time 12.40 p. m., then stood as the last order but one on the official order book. It was Stuart's duty to acquaint himself with all existing orders, and his attention was called to this order by Hyndman. The order books indicated that the order had not run out by the fact that it was not canceled

by the letter H. Stuart afterward received by telegraph from Southford, and entered on the order books the signatures of Richardson and Allen, conductor and engineer of a train affected by the order.

“ Later in the afternoon Stuart, while on duty, negligently sent the following order to the local operator at Waterbury. This order was also entered on the official order books:

“ ‘ No. 52.

Davenport and Engr. Eng. 110 Bx.

4.54 Run to Brewsters as a special, No. 2,
P. M. of Dec. 14th is discontinued.

Davenport, Darrigan, 4.55 P. M.

12 E. H., J. C. S.’

“ This order compelled Darrigan’s train to run over the tracks occupied by the construction train, and conflicted with the first-mentioned order. The last-mentioned order was obeyed, and Darrigan’s train, while moving according to it came into collision with an engine and tender of the construction train while moving under the first-mentioned order.

“ Elliott Holbrook was division superintendent, and the initials ‘ E. H. ’ were to indicate that the orders were sent in accordance with the rule before mentioned, and to put the stamp of authenticity upon them, and to secure uniformity in issuing them, and to indicate that the orders were sent by authority of the superintendent.

“ The train dispatchers had nothing to do with the employment or removal of the engineers, nor any further control than as is herein indicated.

“ Reasonable care had been exercised in the selection of Stuart as a train dispatcher, and with this exception he had been a careful and competent dispatcher. He was immediately and permanently removed by Holbrook. There was no negligence on the part of Hyndman, the chief train dispatcher.

“ The rules and regulations of the defendant company governing the movements of trains were in themselves proper and sufficient rules, and if complied with no collision could take place.

“ There was at the time of the accident no order or rule requiring the construction train to protect itself by flags against all special trains. A short time prior thereto such construction train had worked under such orders.

“There was no rule requiring the train dispatchers to use a train sheet to indicate the position of all trains to the eye, although such a train sheet was sometimes used by the dispatchers; no train sheet was used by Stuart at the time in question.

“There was no negligence on the part of any of the trainmen on either of the colliding trains which contributed to the accident.

“Among the rules of the company which had been placed in the hands of Darrigan, one is as follows: ‘The regular compensation of employees covers all risk or liability to accident.’

“At the time of the accident the speed of Darrigan’s train was about eighteen miles an hour; he was running a ‘consolidation engine.’

“So far as the printed rules and regulations of the company did not govern, the train dispatcher was authorized to give such orders for the movement and protection of trains as he saw fit, and while so acting he had all the authority of, and acted in the stead and place of, the division superintendent. The train dispatcher had no power greater than the superintendent.

“The two orders set forth in full above were duly received by and acted upon by the trainmen to whom they were sent.

“There was no rule of the company requiring a regular train preceding a special to give notice by carrying a flag, indicating that a special train was following. A regular train was due and arrived at Waterbury from the west, shortly before the plaintiff’s train left. This train preceded the construction train only a short time.

“Upon the above facts the defendant claimed that there was no liability on its part, and claimed that Darrigan acting as such engineer, and Stuart, in sending the order, were in a common employment, so that the company was not responsible to Darrigan for such negligence of Stuart. But the court ruled that the company was liable upon the facts set forth, and that Stuart, in sending the order, was acting in the place and stead of the division superintendent, and was performing an act which it was the duty of the corporation to do without negligence.

“The plaintiff offered the testimony of several physicians, some of whom had been employed by the defendant, who had examined and treated the plaintiff, who testified to his exclamations indicating present pain while his injuries were undergoing examination. When he had nearly made up his mind that the defendant would not make any substantial recompense for his injuries,

and, if his injuries were of a permanent and disabling character, to sue the company, he called upon a surgeon in Hartford for treatment, and to ascertain whether his injuries were permanent. This surgeon examined him, and was called as a witness, and testified to the nature, extent, and character of his injuries. The surgeon, after making such examination of Darrigan, requested him to visit another surgeon and get his opinion, and he did so. The last-mentioned surgeon made an examination of Darrigan's injuries and was asked to state the result of that examination. In so doing, against the objection of the defendant, he testified to actions and words of Darrigan while so being examined, indicating pain and suffering. The defendant objected on the ground that the witness was not consulted by Darrigan for treatment, but for the purpose of being at some time used as a witness. The testimony was taken subject to that objection until counsel could produce the case of *Grand Rapids & Indiana R. R. Co. v. Huntley*, 38 Mich. 537, 9 Am. Neg. Cas. 472, and afterwards the matter was held for consideration by the court by consent of counsel. Afterwards the defense called a surgeon who had examined Darrigan, and there was no material difference in the testimony of the witnesses for the plaintiff and defendant as to the extent and character of the injury, and so the court did not find it necessary to make any ruling as to the admissibility of this testimony. But the court was of opinion, and at the request of the defendant states, that such evidence was not rendered inadmissible because the statements were made to a physician for the purpose of qualifying him to testify intelligently, and not for the purpose of treatment; that the true office of such fact was to affect the weight of testimony and not its admissibility. The defense was not understood to waive the objection to such evidence.

“The place of the collision was about four miles from Waterbury, and on a curve; there was then no telegraph station between Waterbury and Southford, a distance of about eleven miles.

“Owing to the large amount of train dispatching it was not practicable for the superintendent to perform that duty personally, and Holbrook has never, on the western division, performed it personally.

“Upon the cross-examination of Holbrook, who had testified on the direct for the defense as an expert that the rules of the company were suitable and proper, and that no improvement

could be made, against the objection of the defendant, the court allowed him to be asked if that construction train had not been run up to a time immediately preceding the day of the accident under rules requiring it to protect itself against all trains by flags; and another witness was asked, against the objection of the defendant, whether such a rule had not previously been worked under on the road. This testimony was admitted in contradiction of the testimony of the defendant, to qualify the statements of the experts for the defendant, and as indicating the possibility that such rules which existed at the time of the accident were not suitable and proper rules.

“The construction train on the day in question was not working near a station, and at the time of the accident was on its way to Waterbury.

“The court assessed the damages at \$2,000. The defendants appealed to this court.”

S. E. BALDWIN and E. D. ROBBINS, for appellants.

C. H. BRISCOE and J. P. ANDREWS, for appellee.

Carpenter, J.—On December 14, 1882, there were two special or irregular trains going in opposite directions on the western division of the defendant's single-track railroad. These trains were run as directed by telegrams from the train dispatcher in the division superintendent's office at Hartford. The train going east was a construction train. About twelve o'clock it was at Southford station, where it received an order from the train dispatcher to “run to Towantic as a special train ahead of No. 6, and then work between Towantic and Waterbury as a special train until six o'clock P. M., and protect themselves with flags against Goble special east after 1:30 P. M.” The above order was given by the chief train dispatcher. Soon after he was relieved in the regular course of business by an assistant. A little before five o'clock the same afternoon, the plaintiff's train going west received at Waterbury from the assistant train dispatcher an order to run to Brewster's as a special. In obeying this order the two trains collided and the plaintiff was seriously injured. The court below rendered judgment for the plaintiff, and the defendant appealed.

The negligence of the train dispatcher is admitted, but the defendant claimed that such negligence was the negligence of a fellow servant, for which it is not liable; and that is the first question presented for our consideration.

In *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, this court held that a master was bound to provide for his servant a reasonably safe place for his work and reasonably safe appliances. An application of that principle to a railroad company would require it to keep its roadbed, rolling stock, tools and implements in good and safe condition, to adopt rules and regulations adapted to its business so as to guard against accidents, and to employ skilful and competent agents and employees in every department of its service. In short, all employers shall be vigilant in the use of means and in the adoption of measures to make the servants in their employ reasonably safe. To that extent the master assumes the risk. On the other hand, the servant assumes the natural and ordinary risks incident to the business, including those arising from the negligence of his fellow servants.

To a certain extent the distinction between the two classes of risks is obvious, and in most cases it is easy to determine on which side of the dividing line the case falls; but along the line on either side is a wide margin of debatable ground. It would be idle to attempt to notice any considerable number of the many cases that have been decided on this subject. They are so conflicting that it is impossible to reconcile them, and it is equally impossible to extract from them any general rule or principle by which future cases or any considerable portion of them, may be determined. Differing views are entertained by different courts in similar cases. To some extent each case is determined by the peculiar circumstances attending it. Nor are the courts uniform in their statement of the principles upon which the master's exemption rests. In an early case the servants are represented as engaged in a joint undertaking in which no one, as respects the others, represents the master, and in which each in his separate department does represent his principal, and in which each stipulates for the performance of his several part. Other cases place it upon the ground that there is an implied contract by the servant to assume the risks arising from the negligence of his fellow servants; and others still rest it upon grounds of public policy. On whatever ground it is placed the practical difficulty remains — who are fellow servants, and who represent the company?

In *Chicago, Milw. & St. Paul R'y Co. v. Ross*, 112 U. S. 377, the Supreme Court of the United States, by a divided court, held that the company was liable to an engineer for the

negligence of the conductor (1). The court say: "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of our railway corporations must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop and for what length of time, and everything essential to its successful movements, and

1. The decision in the case of *New England R. R. Co. v. Conroy*, 175 U. S. 323, 7 Am. Neg. Rep. 182, does away with the vagueness and uncertainty heretofore existing in the federal rule of fellow servants because of the decisions in *Chicago, M. & St. P. R'y Co. v. Ross*, 112 U. S. 377; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368; *Northern P. R. R. Co. v. Hambly*, 154 U. S. 349, and *Northern P. R. R. Co. v. Peterson*, 162 U. S. 346, all of which are referred to at length in the opinion in the *Conroy* case. In the *Ross* case it was held (four justices dis-

senting), that a railroad company was liable for injury to an engineer of a train resulting from the negligence of the conductor in failing to deliver to the engineer a telegram ordering the train side-tracked to allow another train to pass and a collision followed. In the *Baugh* case it was held, (two justices dissenting), that a railroad company was not liable to a fireman for an injury resulting from the negligence of an employee who was acting both as conductor and engineer on a train consisting of engine and tender above.

all persons employed on it are subject to its orders. In no proper sense of the term is he a fellow servant with the fireman, the brakeman, the porters and the engineer. The latter are fellow servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation." Then, after citing several cases, the court adds: "We agree with them in holding — and the present case requires no further decision — that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company; and therefore that for injuries resulting from his negligent acts, the company is responsible." We do not make these quotations as necessarily expressing our views upon a case like that, for the case at bar does not call for it, but for the purpose of showing the position of that court.

In *Sheehan v. N. Y. Cent. & H. R. R. Co.*, 91 N. Y. 332, the facts were these: Train 337, an irregular or special train called "Wild Cat," was going west from Auburn. Train 50 was a regular train going east from Cayuga. The latter was due at Cayuga at 4:40 P. M., and would go east at 4:45 by schedule. At 4:46 the superintendent telegraphed to 337, "Wild Cat to Cayuga regardless of No. 50." No notice was given to No. 50, and no rule of the company required it, but the superintendent telegraphed to the telegraph operator at Cayuga to hold No. 50 for orders. The operator told the conductor to hold No. 50 for train No. 61. He neither exhibited nor delivered any message; no rule of the company required him to do either. No. 61 came in soon after, and No. 50 started towards Auburn. In a few moments it collided with No. 337, and the plaintiff was injured. The court say: "It was not disputed at the trial, nor is it upon this appeal, that the dispatching of train 337 and the holding of train 50 were within the province of the superintendent, nor that, in respect thereto, he represented the defendant in its corporate capacity. Clearly he held that relation."

The defendant's counsel, in commenting upon that case, suggest that the case turned upon the defective nature of the general rules governing the movement of trains, which permitted the telegraph operator to deliver a train order verbally to the conductor. In respect to this the court say: "The peremptory order of the superintendent to go forward regardless of No. 50 was an

assurance that the track would be free and safe for the journey, and required the defendant to take reasonable precautions to make it so. The rules of the company did not require the telegraph operator to submit the message received by him to the conductor or engineer of train 50, nor a communication back from these persons that they had received and understood the order; an omission of either circumstance was the act of the defendants, and in the absence of other precautions might properly be held to constitute negligence." It is obvious that the court regarded the superintendent, who acted as train dispatcher, as the representative of the corporation, and that his negligence was the negligence of the defendant. He failed to give an effective order to hold No. 50, which he might and should have done regardless of rules. In that he, and through him the company, was negligent. And none the less so that the company had failed to establish suitable rules. The intimation of the court is clear that the company was responsible on both grounds.

In *Chicago, Burl. & Q. R. R. Co. v. McLallen*, 84 Ill. 109, the conductor of a special freight train received an order from the assistant superintendent directing him to run fifteen minutes behind the time of a regular freight train. In doing so he came in collision with a regular passenger train going in the opposite direction. The conductor was killed. No notice was given to the passenger train. The company was held liable. The court say: "As between the conductor and company, the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation. His orders to the conductor of a train are essentially the orders of the employer. This rule applies as well to all orders issued by his assistants in office and issued in his name. These orders were all signed in the name of Campbell, the assistant superintendent. If those intrusted by him with the management of the business of the corporation, by orders issued in his name, neglect to issue a necessary order, that is his neglect and the negligence of the corporation."

In Kansas in a similar case the court say: "And those higher officers, agents or servants cannot, with any degree of propriety, be termed fellow-servants with the other employees who do not possess any such extensive powers, and who have no choice but to obey such superior officers, agents or servants. Such higher officers, agents or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, and, in fact, to be the principal."

It is conceded by the defendant's counsel that in Ohio, Illinois, Tennessee and Kentucky, the law is substantially as indicated by the authorities above referred to.

On the other hand it must be conceded that the cases above named and others of like import are a departure from the general current of authorities elsewhere. A conductor and brakeman have been held to be fellow-servants in Indiana and Michigan. *Thayer v. St. Louis, etc., R. R. Co.*, 22 Ind. 26; *Smith v. Flint, etc., R. R. Co.*, 46 Mich. 258. So also an overseer and a laborer under his charge. *Brown v. Winona & St. Peter R. R. Co.*, 27 Minn. 162. And a foreman and workman under him. *Keystone Bridge Co. v. Newburg*, 96 Pa. St. 246; *Danbert v. Picket*, 4 Mo. App. 591; *Hoth v. Peters*, 55 Wis. 405; *Peterson v. Whitebreast Coal & Mining Co.*, 50 Iowa, 674. In Massachusetts they have pretty rigidly adhered to the doctrine of the leading case of *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49. In one case there was an apparent weakening. *Ford v. Fitchburg R. R. Co.*, 110 Mass. 260. But the court soon took pains to prevent that case from being regarded as a departure from the general rule. *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268. In that case Gray, Ch. J., says: "If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work." In another place he adds: "And it makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the plaintiff" (1).

In *Feltham v. England*, L. R. 2 Q. B. 33, it is said that the rule of exemption is not altered by the fact that the servant guilty of negligence is a servant of superior authority whose lawful directions the other is bound to obey. In *Wilson v. Merry*, L. R., 1 H. L., Scotch Appeals, 326 (2), the Lord Chancellor says:

1. For a recent decision on the federal rule of the doctrine of fellow-servant, see *New England R. R. Co. v. Conroy*, 175 U. S. 323, 7 Am. Neg. Rep. 182, where the Supreme Court discusses the same at length, citing and distinguishing many of the leading cases decided in the highest courts of the various States.
2. In *Wilson v. Merry*, L. R., 1 H. L. Sc. 326, 19 L. T. N. S. 30 (H. L. 1868), it appeared that respondents were owners of the Haughhead Coal Pit; Neish

“But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do.”

It seems to us that the rule prevailing in Massachusetts, and which did prevail in England previous to the passage of the

was their manager for this pit, and there was also a general manager over all their works named Jack. Neish had charge of sinking the pit and making arrangements under ground for opening a new seam, for which purpose a scaffold was erected. Two days after its erection, appellant's son was engaged by respondents to assist in driving the level. While so employed, he was killed by an explosion of fire damp, the accumulation of which was caused by the obstruction to the ventilation occasioned by the erection of the scaffold. It was admitted that both Neish and Jack were competent persons, selected for their duties with proper care. An action having been brought at the trial, the Lord Ordinary directed the jury that if they were satisfied that the arrangement or system of the ventilation of the pit at the time of the accident had been designed and completed by Neish before the employment of appellant's son, and if the owners had delegated to Neish the whole of their authority in regard to the matter, then that Neish and the deceased did not stand in the relation of fellow-workmen engaged in a common employment, and that the defendants were not on that ground relieved from liability. A verdict was on this given for the plaintiff with damages. A new trial on the ground of misdirection having been granted by the Court of Sessions against the interlocutor of that court, the appeal was brought to the House of Lords, whereupon it was *held*, confirming the interlocutor, that

in the points referred to there had been a misdirection.

In *Wilson v. Merry*, L. R., 1 H. L. Sc. 326, 19 L. T. N. S. 30, it was held that the liability or nonliability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in any technical sense the fellow-workman or collaborateur of the sufferer. The case of the fellow-workman is an example of the rule, not the rule itself; the rule stands on broader grounds. The master is not, and cannot be liable to his servant unless there is negligence on the part of the master in that in which he, the master, has contracted or undertaken with the servant to do. A master does not contract or undertake with his servant to execute in person the works connected with his business. What the master is bound to his servant to do in the event of his not personally superintending the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he had done this, he has done all that he is bound to do; and if the persons so selected are guilty of negligence, it is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the service of the master, the master is not liable, though the two workmen cannot technically be described as fellow-workmen. A master cannot warrant the competency of his servants.

“Employers’ Liability Act,” hereinafter referred to, unduly enlarges the exemption and confines the liability of employers within too narrow limits. If such a rule had been followed in *Wilson v. Willimantic Linen Co.*, before referred to, the decision must have been otherwise. The rule, we think, does not sufficiently recognize the distinction between agents, managers, and even superintendents, on the one hand, and mere servants and common laborers on the other — between duties which the master is required to perform and work which is ordinarily performed by the employees. It makes little allowance for emergencies, and does not sufficiently regard the obvious fact that cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, and in which some one must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience — some one must hear and obey. To make no discrimination, but in all cases to place those who are invested with authority to direct and control on the same footing with those whose duty it is merely to perform as directed without discretion and without responsibility, seems to us unwise and impolitic.

The duties of a master in most cases are easily distinguished from those of an employee. The proprietor of a cotton mill is bound to have a safe building, a safe dam or engine, and safe machinery; and he is bound to keep them so. To do that he must employ skilled mechanics, who perform his duties. Their negligence is his negligence. The English rule says that he has done his whole duty when he has employed skilful, careful men to do this work. We think that a more salutary rule would be to require him to see that the work is actually done with care and skill; to require him to inspect the work personally if competent, and if not, to employ others who are, and who will exercise more than ordinary care, so as to make it reasonably certain that the operatives will be surrounded by safe machinery and appliances. The liability of the master for the negligence of such agents is a surer guarantee of safety than immunity.

The diligence required will be the greater as the danger and hazards increase. The operation of a railroad requires a greater degree of care than the operation of a cotton mill. It is the duty of a railroad corporation to prepare a time table and adjust the

running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them — a train dispatcher, acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction, that of the latter to obedience. It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service.

A reference to the rules of the company in connection with the facts will serve to show that the views above expressed are applicable to this case. Here were two irregular trains to be moved in opposite directions on a single-track railroad so as to pass each other. It was necessary that their movements should be directed by instructions emanating from some one intelligent source. The rules of the company provide for moving trains by special orders. One rule is, "All orders shall be given by a superintendent, or by a dispatcher appointed for that purpose, under directions of a superintendent; no other person will be allowed to give them." Another rule is, "Division superintendents are supreme on their respective divisions, and are responsible only to the management for such orders as they may give." The following is from the finding of the court: "So far as the printed rules and regulations of the company did not govern, the train dispatcher was authorized to give such orders for the movement and protection of trains as he saw fit, and while so acting he had all the authority of, and acted in the stead and place of, the division superintendent."

The train dispatcher then, in respect to the matter of moving these trains was supreme. The whole power of the corporation

whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority, and in its stead. The engineer was bound to obey his order. Disobedience or deviation would have been subversive of order and discipline, destructive in its consequences, and just cause for immediate dismissal. He received an order to go west from Waterbury on a single-track road at a time when another train was approaching Waterbury from the west. The order was imperative and it required of him implicit obedience. He obeyed. He did not then know the consequences, but the company did or should have known. He conformed to the order as he was bound to, and while so conforming, and as the direct consequence thereof, he was injured. Reason, justice and law require that the company should be held responsible.

Another rule provides that "in emergencies each employee must promptly obey the orders of any superior officer." By that rule the company made the order of that officer, whoever he may be, and of whatever grade he may be, its own. If the order is an improper one, and, in executing it, another employee is injured, the company should be responsible. In such a case the grade of service becomes and is material.

That rule too in its spirit had an application to the case. There was something in the nature of an emergency. There was no room for divided counsels; there must be unity of purpose and one mind must control. That power and duty devolved upon the train dispatcher.

It is worthy of notice that the principles which we think should govern this case have been embodied in an act of Parliament and are now the law of England. The decisions of her courts on this question have been overruled by statute. In 1880 the "Employers' Liability Act" was passed, the first section of which is as follows:

"When, after the commencement of this act, personal injury is caused to a workman — 1, by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or, 2, by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the service of such superintendence; or, 3, by reason of the negligence of any person in the service of the employer to whose orders or directions

the workman at the time of the injury was bound to conform, and did conform, when such injury resulted from his having so conformed; or, 4, by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer; or, 5, by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway;—the workman, or, in case the injury results in death, the legal personal representative of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.” The act limits the amount to be recovered in certain cases; and will cease to be operative at the end of seven years unless re-enacted.

Among the rules of the company which had been placed in the plaintiff's hands is the following: “The regular compensation of employees covers all risk or liability to accident.” The record does not show that the defendant claimed in the court below that this was equivalent to a contract exempting it from liability for its own negligence; nor do the reasons of appeal present any such question. When such a question is presented we may be called upon to consider whether public policy will permit a railroad company to make such a contract with its employees.

The plaintiff offered a surgeon as an expert. The witness had examined the plaintiff's injuries, and was asked to state the result of his examination. In doing so, against the objection of the defendant, he testified to actions and words of the plaintiff, while being so examined, indicating pain and suffering. The defendant objected, on the ground that the witness was not consulted by the plaintiff for treatment, but for the purpose of being at some time used as a witness. This evidence was taken subject to the objection, but the court subsequently made no ruling on the subject. We think the evidence was clearly inadmissible. *Pierce on Railroads*, 298; *Grand Rapids & Ind. R. R. Co. v. Huntley*, 38 Mich. 537, 9 Am. Neg. Cas. 472. If otherwise easy facilities would be furnished for parties to introduce in evidence their own declarations, made out of court, not under oath, and when the temptation to exaggerate, and even to utter untruths, would be pretty strong. Ordinarily, when a patient consults a physician with a view to treatment he will state the facts as they

are; but, unfortunately, when a party consults a physician preparatory to the trial of his case simply, his statements are not always reliable. But it does not necessarily follow that the defendant is entitled to a new trial. The statute (Session Laws of 1882, p. 146), requires the court, if it finds errors in the rulings or decisions of the court below, to reverse the judgment or order a new trial, unless such errors are immaterial or such as have not injuriously affected the appellant.

The extent of the injury, although material in its bearing upon the amount of damages, was not a point seriously controverted. The main contention seems to have been on the question of liability. In respect to this evidence the court finds that "afterwards the defense called a surgeon who had examined Darrigan, and there was no material difference in the testimony of the witnesses for the plaintiff and the defendant as to the extent and character of the injury." The evidence objected to agreeing substantially with that offered by the defendant, it is evident that it did not influence the judgment. We think that the exception in the statute was designed to apply to a case like this, and that for such an error under such circumstances we ought not to order a new trial.

The division superintendent was placed upon the stand as an expert by the defendant, and he testified that the rules of the company were suitable and proper rules and that they could not be improved. On the cross-examination he was asked, against the objection of the defendant, if that construction train had not been run up to a time immediately preceding the day of the accident under rules requiring it to protect itself against all trains by flags. The view we have taken of this case renders this question unimportant. We are inclined to think, however, that the question had a general bearing upon the subject of the direct testimony of the witness, and that there was no error in allowing the question to be put. But if otherwise the defendant was not harmed by it, because the court found that "the rules and regulations of the defendant company governing the movements of trains were in themselves proper and sufficient rules, and if complied with, no collision could take place."

For these reasons we do not order a new trial.

In this opinion the other judges concurred, except GRANGER, J., who dissented.

BERTELSON v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Supreme Court, Dakota, February Term, 1888.

[Reported in 5 Dak. 313.]

PEDESTRIAN CAUGHT BETWEEN FREIGHT CARS WHILE CROSSING TRACK — BACKING TRAIN — PLACE USED AS CROSSING — CONTRIBUTORY NEGLIGENCE. — In an action to recover damages for the death of plaintiff's decedent, who was killed by being caught between two freight cars on defendant's railroad track at or near a crossing, which, however, was not a public crossing but its use had been acquiesced in by the railroad company whose cars were usually separated there and left to stand upon the track, it appeared that the decedent in attempting to pass over the track at the place of accident between two freight cars which were standing there was struck by reason of a train backing towards the standing cars and injured; it also appeared that there was nothing to obstruct the view of decedent, or to prevent him from seeing or hearing the movement of the train as it backed down the track. *Held*, that even though the railway company's servants were negligent in not keeping a proper lookout and in not ringing the bell, the contributory negligence of the decedent precluded recovery.

GROSS NEGLIGENCE — PLEADING. — Where gross negligence was not alleged in the company, nor any evidence tending to establish it, there was error in submitting the question to the jury.

APPEAL from the District Court of Turner county. The facts appear in the opinion. *Judgment reversed.*

On the subject of gross negligence the court charged the jury as follows:

“Whether or not these defendants were guilty of gross negligence, wilful carelessness, or as some of the authorities see fit to describe it, ‘reckless management of their trains,’ is a question of fact for you to determine from the evidence. It is only in case you find they were exercising such a want of care that their acts became wilful recklessness, that the plaintiff would be entitled to recover; and in determining this question of the degree of care, or the want of care, or gross negligence and wilful carelessness of the defendant's agents, if any such existed, you have a right to take into consideration all of the evidence that has been given upon this point, — whether or not the bell was rung; the evidence as to the rapidity at which that train was being backed down; the grade upon which the train was running; the number of hands that were upon the train, and their position upon the

train, — take them all into consideration, and determine, if you can, whether or not under the circumstances the agents of the defendant were guilty of gross negligence."

J. W. CARY, C. H. WINSOR (BURTON HANSON, of counsel), for appellant.

FRANK R. AIKENS, for respondent.

Thomas, J. — This was an action in the district court of Turner county to recover damages for alleged wrongful killing of respondent's decedent at Marion Junction, in said county, on the 7th day of October, 1885.

Respondent's decedent was killed by being caught between two freight cars on the transfer track of appellant's railway company at the village of Marion Junction. The station platform at this station is situated between the main line of appellant's railway and the main line of the Running Water branch and a short track connected therewith. The transfer track on which the accident occurred is about 1,100 feet in length, and connects with the main line of appellant's railway east of the station platform, and with the main line of the Running Water branch west of said platform; thus running somewhat parallel with these two lines, and south of the station platform, and about sixty feet distant therefrom.

There are three traveled ways leading from the village of Marion Junction to the station platform: *First*, there is a footpath which reaches the platform at or near the east end of the station building; *second*, there is a traveled way a little to the west of the footpath, which reaches the station at or near the west end of said building; *third*, there is another road or street that leads down to the west end of the platform. It is about 700 feet from the east end of the transfer track to the point where the footpath crosses it.

It is admitted that the footpath is not a public street laid out by authority, but the evidence shows that it was generally used by the people of the village in going to and from the station, and such use was acquiesced in by appellant; at least, it was so used with appellant's knowledge, and cars were frequently separated at the point where the path crossed the track, in order that it might be so used.

The transfer track was used to stand cars on, and to transfer them from one division to the other. When the accident occurred there were standing on this transfer track six or seven cars

consisting of stock and box cars, and one caboose. The caboose was easterly of the cars. These cars were separated near the center from eighteen inches to three feet. As to whether the opening through which respondent's decedent attempted to pass was directly over this path, or fifteen or twenty feet east of it, the evidence is conflicting.

This was the situation of affairs when appellant's mixed train of about fourteen freight cars, a baggage car, and one passenger coach came in from Running Water. This train was on time, and stopped as usual at the station platform, and left standing there the baggage car and passenger coach. The remainder of the train ran down over the east switch of the transfer track, and backed in on the transfer track in the direction of the caboose and cars, and moved at the rate of two or three miles an hour. As the train backed in, a brakeman was standing on the rear car; another on the top of the car near the engine. The rear brakeman passed the signals to the brakeman near the engine, and he in turn passed them to the person in charge of the engine. None of the trainmen or employees of appellant knew of the opening between the cars standing on the siding. While this train was being thus backed down upon the track, respondent's decedent, who was on the station platform, started to cross over this transfer track in the direction of the village, and in doing so attempted to pass between two of these freight cars standing thereon. Just as he entered the two or three feet opening between the cars, they were thrown together with such violence as to injure the decedent fatally.

There was nothing to obstruct the view of decedent, or to prevent him from seeing or hearing the movement of the train as it backed in and down this track. He was a man in the possession of all of his faculties, and the day was clear and calm, and as he started from the station platform towards the transfer track he was on the inside of the somewhat of a semicircle formed by the track, and could have seen and heard the train had he looked and listened. Others in the same vicinity both saw and heard it. He was warned just before he entered between the cars by at least two persons, who were but a short distance from him, of the approaching train, in loud tones of voice, and by vigorous gesticulations, which he did not hear, or if he heard he did not heed, but walked along with his head down as if in a study, and stepped between these cars as aforesaid. None of the trainmen or

employees of appellant saw or knew the decedent was attempting to cross the track, but could have seen him before he went between the cars had they looked in that direction. The train was stopped within one-half a car's length after the alarm was given. As to whether the bell was ringing or not, the testimony is somewhat conflicting.

The above is substantially a correct statement of the facts as we gather them from the record upon which the District Court, after the usual charge, submitted the case to the jury, which resulted in a verdict in favor of respondent for the sum of \$5,000, for which sum judgment was rendered by the court. In due time appellant entered a motion for a new trial based on the bill of exceptions, which was overruled. The case is here on appeal, and appellant seeks to reverse the judgment because of numerous alleged errors as set forth in the bill of exceptions, most of which relate to the charge of the court. These voluminous assignments of error, however, when stripped of their verbose drapery, may be substantially and briefly stated as follows:

First, the court erred in refusing to direct a verdict for defendant.

Second, the court erred in submitting the question of gross negligence on the part of defendant to the jury.

At least these are virtually the only errors pressed upon the attention of this court by counsel in their brief.

The first of these alleged errors, it will be observed, calls directly in question the *raison d'être* of the judgment itself, and is based on the insistment that the evidence is insufficient to justify the verdict in two particulars: *First*, it fails to show any negligence on behalf of appellant; *second*, the undisputed testimony shows that respondent's decedent contributed to the accident by his own culpable negligence.

It is clear that, if these propositions are true, the motion to direct a verdict for defendant should have been sustained. This would be the case if only the latter were true, unless there is some evidence tending to establish gross negligence on the part of the employees of appellant in refusing to do what was reasonably necessary to prevent the injury after they had discovered the perilous position of the deceased, in which event appellant would be liable notwithstanding the contributory negligence of deceased. We are unable, however, to discover any evidence of this character in the record.

We think there is some evidence tending to show want of ordinary skill and care on the part of appellant's agents in the management and movement of the train along the transfer track in the direction of the footpath, under existing circumstances. They knew that this path was generally used by the public in going to and from the station, and therefore ordinary care required that they should have been on the lookout in the direction of said crossing in order to have discovered whether or not there was any one attempting to cross it, and they should also have blown the whistle and rung the bell while thus backing in upon this side track. We think the great preponderance of testimony shows that the bell was being rung at the time, but, as there is somewhat of a conflict in the evidence on this point, we shall treat it as a fact proper for the jury.

This being true, appellant would undoubtedly be liable in damages for the injury unless the deceased contributed to the accident by his own negligence, in which event it is equally clear he cannot recover. *Chicago, R. I. & Pac. R'y Co. v. Houston*, 95 U. S. 702, 7 Am. Neg. Cas. 345; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Holland v. Railway Co.*, 18 Fed. Rep. 247; *Rogstad v. Railroad Co.*, 31 Minn. 208, 17 N. W. Rep. 287.

The question, therefore, for consideration and determination, is whether the undisputed testimony, as disclosed in the record, establishes contributory negligence on the part of the deceased.

The evidence, as we view it, shows that deceased was a man in the possession of all his faculties; that he left the station platform and walked for a distance of sixty feet towards the transfer track, on which stood some six or seven box cars, which were separated at a point near the center from eighteen inches to three feet, and attempted to pass over the track, and between these cars, and while thus going from the platform to the transfer track, there was being backed in upon said track, within full view and hearing of deceased, a freight train, consisting of fourteen cars and a locomotive, moving at the rate of about three miles an hour in the direction of the cars between which he was to pass.

Notwithstanding these facts, he either deliberately or thoughtlessly continued his walk, and stepped upon this railway track between these narrowly separated cars, just as they were thrown together by the contact of the moving train, and was caught between the bumpers, and fatally injured.

It also appears from undisputed testimony that other persons perhaps not so favorably situated as he, both saw and heard this train as it rumbled over and along this side track, at least two of whom, who were but a short distance from him, warned him in loud tones of voice, and by vigorous gesticulations, of the approaching train, which he failed to hear or see, or at least failed to heed, but continued his walk, and stepped as it were into the very jaws of death, looking down at the ground, seemingly oblivious to his dangerous surroundings.

It seems to us a mere statement of the facts and circumstances under which the accident occurred not only shows conclusively that deceased did not exercise due and reasonable care, but that he utterly failed to exercise any care whatever, but either deliberately, recklessly, or thoughtlessly went upon this railroad track, always to be regarded as a place of danger, and especially so under the peculiar circumstances existing at the time of the accident.

The fact that the trainmen were negligent in not keeping a proper lookout, and in not ringing the bell, did not relieve the deceased of the duty and the necessity of exercising ordinary caution and care for his own safety. Want of ordinary care on the part of appellant in these particulars was no excuse for negligence on his part. It was his duty to have looked and listened in order to discover and avoid the danger of the approaching train, and not to walk heedlessly or carelessly into this place of possible danger. Had he used his senses he could not have failed to have seen and heard the train in time to have avoided the accident. If he neglected or failed to use them, and walked thoughtlessly upon the track, he was clearly guilty of culpable negligence which contributed to the accident and resultant injury, and he cannot therefore recover. If, using them, he saw the train, and yet attempted to cross the track, in the face of apparent danger, he, not the appellant, must bear the burden consequent upon his mistake and rashness.

It is well settled that a railway track is a place of danger, and a person about to go upon or over the same, whether at a public crossing or elsewhere, is bound to do that which is ordinarily needful to ascertain whether or not it is safe to do so. Otherwise they assume the risk, and, if injured, they will not be heard to complain of others.

These principles of law are so familiar and so well settled that

we do not deem it necessary to buttress them with citations of authorities, but will simply refer to the case of *Railway Co. v. Houston*, and *Schofield v. Railway Co.*, cited *supra*, wherein this doctrine is very fully and ably discussed and upheld.

This rule, as laid down in these cases, is not only the law of this territory, but of nearly all the States of the Union where courts have had occasion to apply it. It is by no means a harsh or rigorous rule, but is just and reasonable, imposing no onerous burden or hardship on any one. Looking and listening are involuntary acts. We do both with but little or no exertion, and to do so requires the exercise of the least possible care.

This rule is not invoked in favor of diminished liability on the part of railroad companies, but, as suggested by counsel for appellant, it is a wholesome and necessary rule in favor of human life.

The application of this rule to the facts of the case at bar must of necessity result disastrously to respondent's claim, and in the reversal of the judgment of the District Court. There is nothing upon which it can stand, as the evidence conclusively shows that deceased contributed to the accident by his own negligence.

As to gross negligence on behalf of appellant's employees, it is not alleged in the complaint, nor is there any testimony tending to establish it. Hence the District Court erred in submitting it to the jury, and the charge of the court in reference to this question was equally erroneous, as it called the attention of the jury to assumed facts of which there was no proof.

The judgment is reversed. All the justices concurring, except PALMER, J., dissenting.

DROVER INJURED IN COLLISION BETWEEN FREIGHT TRAINS — PASSENGER OR EMPLOYEE — COMMON CARRIER — LIABILITY TO DROVER IN CARE OF LIVE STOCK ON TRAIN. — In *FLINN v. PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD CO.*, 1 Del. 469 (*Superior Court, Fall Sessions, 1857*), action for damages for injuries sustained by plaintiff, a drover, in a collision between freight trains, plaintiff had a verdict for \$13,000. The court (per WOOTTEN, J.), in charging the jury, stated the case as follows: "As you are already aware, this is an action brought by John Flinn against the Philadelphia, Wilmington and Baltimore Railroad Company, for the purpose of recovering damages, which it is alleged he sustained on the night of the 18th of March, 1856, by reason of a collision between what is called the

through freight train, which left Baltimore at half-past five o'clock of that day, and an extra freight train which left the same place at half-past seven o'clock of the same day, and followed the through freight train, the regular mail train having left at a quarter before seven. It appears that the mail train, at some one of the intermediate stations, passed the through freight train, and that the latter then proceeded towards its place of destination, and that about nine o'clock, when the train was in sight of Aberdeen, about four miles from Havre de Grace, the through freight train on which the plaintiff was, was run into by the extra freight train, which was following it, whereby the collision referred to in this case occurred, which resulted in the injury to the plaintiff for which he is now seeking redress.

"The plaintiff rests his right of recovery on the ground of the responsibility of the defendants — the railroad company — to carry him over their road safely, as a passenger. But it is further contended for him, that whether he was on board as a passenger or otherwise, if he was rightfully and lawfully there, the defendants are equally liable for any injury he received, which resulted from the negligence of the defendant's servants. On these grounds, the plaintiff asserts his right of recovery of damages commensurate with the injury received by him.

"The defendants resist his right of recovery on several distinct grounds.

"First. That the defendants were not and could not be regarded as common carriers of persons, in respect to the plaintiff on that occasion.

"Second. That if the defendants are liable at all, it is on a special contract or undertaking, and that he cannot recover in this form of action.

"Third. That the relation in which the plaintiff stood to the defendants on this occasion, was not that of a passenger or traveler over their road, as in ordinary cases, but that he was in the freight train before mentioned, rather in the character or capacity of an employee or servant, by the permission and agreement of the company, to take care of his live stock, and upon terms and conditions which exempted the company from any liability for the injury which he received.

"Fourth. That the injury complained of was occasioned, in part at least, by the fault of the plaintiff, and not by the negligence of the defendants, and therefore he is not entitled to recover.

"They say the through freight train was detained at Baltimore some twenty-five minutes beyond its usual time of departure, at the

instance and request of the plaintiff, to enable him to get his stock on board, and that that delay was the cause of the collision, which resulted in the injury to the plaintiff, and without which he would not have received it." The court then reviewed the case at length and stated the points of law to the jury, which points are sufficiently stated in the syllabus as follows:

"Depositions taken on a commission out of the State may be read in evidence, notwithstanding the deponent is present in court and ready to testify as a witness at the trial of the case.

"A master is not liable to his servant for injuries occasioned to him by a fellow-servant in the course of their common employment, provided the latter is a person of competent skill and care; because when the former engages in the service of the master, he undertakes, as between himself and the master, to incur all the ordinary risks of the service, which includes the risks incurred from the negligence of his fellow-servants in the same employment.

"But a drover traveling in a freight train of a railroad company with live stock, for the purpose of taking care of his live stock in its transportation over the road of the company in such train, although it may be the established usage of the company in such cases to grant to the owner of such live stock a drover's ticket, for the purpose of accompanying and taking care of his own stock in such train, on his releasing the company from any risk or liability to him for the safe transportation of such stock, and paying the rate of freight charged for it, and without his paying any fare or compensation to the company for his own passage in the train, other than what was included in the amount of freight charged and paid on his stock, which by the regulations and practice of the company was twenty-five per cent. higher in rate, when neither the owner nor any agent of his accompanied the stock on the train for the purpose of taking care of it, will not constitute in law the relation of employer and employee, or of master and servant, for the occasion, between the company and such drover and owner or agent so traveling under such circumstances and upon such terms and for such a purpose, on such a train. But, on the contrary, where it is the usage and practice of the company, in such cases, to issue to such a person a special ticket, called a drover's ticket, on his paying the freight on his stock, and executing a release to the company from any liability to him for the safety of its transportation, containing a notice that the company will not be responsible for the personal safety of the holder of it in traveling over their road by such train, and restricting his right and privilege to travel under it to the freight trains of the company only, it was held that a drover traveling on such train with

his live stock, and who had paid the usual freight chargeable under such circumstances upon it, and released the company from its liability for the safe transportation of it, whether he had or had not such a ticket as a drover's ticket at the time, was rightfully and lawfully a passenger on such freight train; and although he had paid no fare or compensation for his own passage, except such as may have been embraced in the freight paid on his stock, under the circumstances and in the advantages and exemptions accruing to the company from his presence and personal attention to his own property on the train, and notwithstanding he was traveling, not in a passenger train, but in a freight train, in which the company never carried, or advertised or held itself out as prepared to carry passengers, or any class of persons other than drovers or their agents, traveling with their live stock, and then only on the terms and conditions as to their personal safety before stated, still the company stood in the relation and sustained the obligations of a common carrier of passengers for hire towards him, and were liable as such to him for injuries suffered by him in a collision between such train and another freight train of the company, occasioned by the negligence or want of skill on the part of its servants in charge of either or both of such trains; and that an action on the case would lie against the company by reason of its liability as a common carrier of passengers for hire under such circumstances, to recover damages for such injuries; because under such circumstances it would not be the case of a special undertaking by the company as ordinary bailees for hire, to carry the party over its road on an express contract that the company should not be liable for his personal safety, and if liable at all would only be liable as such ordinary bailees, or as a private carrier for compensation in another form of action, that is to say, in an action of *assumpsit* based specifically on such express contract.

“Common carriers consist of two classes, common carriers of goods, and common carriers of persons for hire; and railroad companies being incorporated by law for the transportation of passengers as well as property, for hire, are common carriers of both descriptions. But if, as a general thing, they confine the transportation of goods to their freight trains, and the conveyance of passengers to their regular passenger trains, they are common carriers of goods as to the former, and of passengers as to the latter; nevertheless if by the latter they are in the habit of carrying goods for hire, they may become common carriers of goods by such trains, and if by the former they are in the practice of carrying passengers for hire, such as emigrants, or drovers, or any other class of traders with their property, they may also become common carriers of

passengers as to such persons by such trains as well as of property, and may thus assume the obligations and liabilities of common carriers indifferently both of persons and property by such trains. There is a wide distinction, however, between the liability of common carriers of goods and a common carrier of persons for hire. The former are responsible for all injuries to the goods, except such as are caused by the act of God, or the public enemies, even in the absence of negligence; because the former are regarded in law in the light of insurers of the goods committed to their charge, against all other injuries, whilst a common carrier of passengers is liable for injuries to the latter only in case of negligence. But the law in its beneficence will not allow of any trifling with the lives or personal safety of human beings, and therefore exacts great care, diligence and skill from those to whom, as common carriers, they commit themselves. The degree of skill, care and diligence required of common carriers of passengers and of their servants, and especially of railroad companies, employing as they do the powerful and dangerous agency of steam, in such cases, is none the less, but only the greater for this reason.

“It was the practice of the company to receive and carry the owners of live stock with their stock on its freight trains, upon their paying the freight charged in such cases, and if the plaintiff had paid the freight on his stock and was traveling in such a train in conformity with such usage, then he was there rightfully and lawfully, and the company and its servants were bound to exercise the same degree of care and diligence in conveying him over the road in the train in question as would be incumbent by law on common carriers of passengers for hire generally; and so far as this duty was concerned, they stood in a no less responsible relation to him. For it would be inconsistent with this relation and utterly at variance with the duty which the law, on the ground of public policy and as the conservator of the lives and security of passengers, imposes on common carriers of persons, to allow of an exemption, or limitation of the responsibility of the company, such as was contained in the notice indorsed on its drover's tickets, for the personal safety of such passengers against injuries resulting from its own, or the negligence of its servants. On the contrary, if the injuries complained of by the plaintiff were the result of such negligence, the company would be liable for them notwithstanding such notice and limitation of its liability in such cases.

“If, however, the injuries complained of by the plaintiff were occasioned by his own fault or negligence, or if his own conduct or imprudence co-operated with the negligence or misconduct of the

servants of the company to produce them, he could not recover for them; because he could not hold others liable for the consequences of his own negligence or misconduct. But the detention of the train in which he took passage, by his request, beyond its usual time of starting, for the purpose of accommodating him in getting his live stock upon it, without which it was alleged and contended the collision in question would not have happened, was not a circumstance of this nature, or such as would throw upon him the responsibility for the disaster; because the delay in the departure of the train was not his act, but the act of the company, or its servants, and the original detention itself was altogether immaterial, if the accident was the result of subsequent negligence on the part of the latter, at any time after the train started, as it must have been, if it was the result of negligence at all on the part of the company, or its servants."

Verdict for plaintiff for \$13,000. The case was afterwards taken to the Court of Errors and Appeals on a bill of exceptions tendered to the charge of the court by the defendants, but the same was sustained and affirmed on all the points ruled by the court below.

PARVIS v. PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

Superior Court, Delaware, May Term, 1889.

[Reported in 8 Del. 436.]

RIGHT OF ACTION — SURVIVAL — STATUTE — WEIGHT OF EVIDENCE — CARE REQUIRED OF RAILROAD COMPANIES IN OPERATION OF TRAINS — CARE REQUIRED OF TRAVELER APPROACHING RAILROAD CROSSING. — 1. The right to sustain a personal action for damages to a person did not survive to his representatives at common law, but exists in this State by force of the statute.

2. As a general thing, the testimony of witnesses who swear positively to a fact is entitled to more weight than those who swear negatively in regard to it.
3. The terms "ordinary care and diligence," which railroad companies are bound to exercise, when applied to the management of railroad engines and cars in motion, must be understood to import all the care and circumspection, prudence, and discretion, which the peculiar circumstances of the place or caution reasonably required of such company or their servants; and this will be increased or diminished according as the ordinary liability to danger to others is increased or diminished in the movement or operation of them.
4. The law imposes upon every person the duty to use ordinary care for his own protection and security against accident; and the care and diligence which

he is bound to exercise must be in proportion to the danger to be avoided, which is such care, prudence, and diligence as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself from being injured.

(Syllabus by the Court.)

ACTION on the case for damages sustained by the death of plaintiff, who was run over by defendant's cars. The facts are stated in the charge to the jury. *Disagreement of jury.*

CHARLES B. LORE and ALBERT CONSTABLE, for plaintiff.

GEO. V. MASSEY and GEO. GRAY, for defendant.

Comegys, Ch. J. — This case which you are trying is one of the most important ones that has ever been presented to a jury in this county. It has created a great deal of public interest, not only on account of the peculiar features of it, but from the fact that it has been conducted before you by four men who certainly have not their superiors among us, and one who has a reputation which has become much more extensive than the limits of his own State. It has been a great satisfaction to sit and see this case tried, although the mental labor and anxiety and care of mind on the part of the court has been great, to avoid doing or saying anything which might seem to indicate that they had any feeling or judgment in regard to this case, in any form. It has, nevertheless, been to them one of great interest, and they have watched its progress from beginning to end with great satisfaction. Certainly the people of this State have reason to be very proud that there are men yet living who can conduct cases before jurors with all the ability, skill, and eloquence of the best men of the past time. This, as I said, is a very important case, and I will proceed now to deliver the views of the court to you in regard to the law, prefacing the statement of the law with such remarks in regard to the same as it would seem proper to lay before you, in order that you may have your mind clear upon the prominent facts and features of the case which you are trying.

According to a maxim, as old perhaps as the system of common law itself, no action would lie by any one except the party actually injured, to recover damages as compensation for the wrong committed to his person. A suit might be brought by such party in his lifetime, but, unless prosecuted to a judgment during that period, it absolutely ended when he died. It did not survive, as the language of the law is in favor of his personal

representatives, — that is, his executors and administrators, — but died with his life. And this was also for a long time the case with respect to actions technically personal, as distinguished from those concerning land or real estate; and it required a legislative enactment in England, whence the common law is derived, to create, survive, and save in behalf of their personal representatives suits for damages begun by decedents in their lifetime, and pending and undetermined at the time of their death. Such an enactment became a part of our system of law, along with the more ancient common law, with the institution of civil society in this colony by our ancestors, and the makers of the Constitution of 1792, provided a mode to make such representatives parties, as they did also for making such parties in the case of their decedent, who, in his lifetime, was a party to such action. Still, with respect to injuries to the person of a decedent, the venerable maxim, that a personal action dies with the person, obtained. Our legislature has, considering the large number of collisions that increasedly occur from the rapid movements of railway engines and trains along roads which cross thoroughfares of travel by wayfaring people, and the fact that, as was oftentimes the case, such collisions resulted in the death of some of those people, passed the following enactment, to be found in our Code, p. 644: “Section 1. That no action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction. Sec. 2. Whenever death shall be occasioned by unlawful violence or negligence, and no suit be brought by the party injured to recover damages during his or her life, the widow of any such deceased person, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.

This act includes all injuries to the person, however committed, but those occasioned by the collisions referred to were the chief ones in the contemplation of the Legislature at the session of 1866, when the act quoted was passed. Although several personal actions of the kind referred to have been brought and proceeded into judgment since the date of the act, yet the one we are now trying is the only one brought, after the death of a party killed by a railroad accident, under the authority of the aforesaid

second section. It is by the widow of the deceased, Dr. Parvis, Mrs. Henrietta V. Parvis, to recover damages occasioned by her from the loss of her husband, on account, as she claims, of the negligence and want of care on the part of the defendant, the Philadelphia, Wilmington and Baltimore Railroad Company, in running one of its passenger trains upon and along the railroad operated by it in this county, extending southward through the State. The accident which resulted in the death of the plaintiff's husband happened, according to the testimony before you here, on the night of the 5th of March, 1888, at a place called "Frog-town Crossing," about half a mile above Middletown, and where the State road or common highway, between Middletown and this city, is crossed (going southward) at an acute angle, with its apex towards that place. It occurred about half-past seven o'clock of the night of that day, while the south-bound passenger train was moving along the railroad on about its usual time. Dr. Parvis was driving along this common highway in his York wagon, with the top up, on his way home to Middletown, and in proceeding to the Frogtown crossing had as a companion the witness Oliver J. Jamison, from a point about 100 yards north of his factory (which you have heard spoken of by witnesses, sometimes as the "Phosphate Factory," sometimes as the "Bone Factory," and sometimes as the "Bone Mill"), and had driven to a point about the same distance south of it. Here they parted company, Dr. Parvis saying that he must get home; that he wanted to get his supper and be fixed up a little before he went to the entertainment in the hall that evening; and that he would see him after the entertainment was over. He went off, as the witness says, in a little jog trot, and that he himself kept on in a walk. This is the substance of his statement of the meeting of Dr. Parvis and himself upon the highway, and their progress along it. If there is no mistake upon the part of Mr. Jamison to the distance from the point of separation below the factory to the factory itself, they were at that time, as appears by the plots in evidence, something less than 300 yards from the fatal spot where Dr. Parvis lost his life, — the factory being 1,111 feet at its south corner from the spot where the collision occurred. The highway was at a very acute angle with the railroad until near the railroad crossing, when it became less so, curving eastwardly. This is shown by the plot.

Mr. Jamison stated that he drove in a walk until he came to a

point which he indicated on the plot, very near a house shown thereon, and that during that time he neither saw nor heard any train. He stopped there, however, and he says that a moment afterwards he saw and heard the train; that it was coming past him, and that was the first he had seen or heard of it; that he had stopped and listened for it, and that he could not see it until it passed by him. He also said he stopped but a very short time before he heard it, and that he was both listening and looking. When it had passed, he went on towards Middletown, without knowing that any accident had happened. Mr. Jamison further said, in his cross-examination, that the night was very cold, and the road rough, and it was dark. In further cross-examination, he said he stopped north of the small house, and that he was watching for the train; that his view was not unobstructed, as there was a hedge eight or ten feet in height, which he could not see over; that he did not see the train until it was opposite to him, nor hear it, except that he might have done so an instant before it came past him. Upon this point of not hearing the train, the plaintiff produced to you eight other witnesses, who stated that they did not hear the train, nor the whistle, nor the bell, at any time from the time when they first saw that train, which was up about the phosphate factory, until it came down to the crossing, where this lamentable accident occurred. As this is a very material statement, of course it became necessary for the defendant to fortify his position with rebutting testimony, and it has produced before you the testimony of the engineer and the fireman who were in or upon the engine, or in the cab, as I believe they call it, at the time this occurred; and also three other witnesses, two of them colored men, and the other Mrs. Daly, the wife of Mr. James Daly, who was one of the nine witnesses of the plaintiff, to prove, according to their best knowledge, that there was a whistle blown and a bell rung. Of these witnesses, two of them (the engineer and the fireman) said positively in their testimony that the bell was commenced to be rung just after they left Armstrong corner, and that it rung continuously until they reached this crossing, and that when they came to the crossing the whistle was also blown, in view of the apparent accident before them. These colored men both said that they heard this whistle and this bell ringing continuously from a point about the phosphate factory down to the railroad crossing; and Mrs. Daly states also she was with her husband at the time,

and very emphatically states that she heard it all the time ringing until this accident occurred.

Now, gentlemen, you have on one side five witnesses who testified positively to their knowledge of the ringing of the bell; on the other, you have the testimony of nine witnesses, most of whom, I believe, were upon the train, or at least the chief portion of them, I think, that they heard no bell whatever, nor any signal given until this accident occurred. One point made by the learned counsel for the defendant is this: That in a case where the testimony is positive on one part, and is negative on the other, — that is, as in this case, that where parties did hear, and that they did not hear, — that in estimating this case, and in treating it, as you must necessarily do, you must give more weight to the testimony of those witnesses who swear positively to the fact; and I believe they went so far as to ask us to instruct you that the positive testimony in such a case is the testimony alone to be relied on. Well, we are not willing to do that. We are willing to leave this matter entirely to you, taking into consideration the fact that one certainly of these witnesses may be supposed, without doing violence to anything that is right, to have spoken under the influence of some bias in the matter. And why? Because he was the engineer of this train, and his duty was, according to the instructions of the company, which prevails in all cases, to take all necessary care and caution to warn people upon the approach of trains to crossings, and particularly to crossings of great danger like this was. Then, if he neglected his duty in any respect, he would be responsible to the company, not only for his place, if they saw proper to remove him from it, but he would also be responsible to the company in damages for a breach of his duty, if the company were liable for damages in this action. In regard to the other four witnesses on the part of the defendant, who apparently are without the influence of any bias whatever, one of them has been discredited by the testimony of a witness produced on the part of the plaintiff, — that is, the man Turner; but, as in all cases of that kind, you are to consider whether he spoke the truth or not. A man may be discredited by one witness, and yet that does not necessarily invalidate his testimony, but it does throw upon it a suspicion, if the impeaching witness is a man who holds a rank in a community that Cyrus Tatman does in this. The witness Ryan, who was the fireman on that train, and the colored man and Mrs.

Daly, you have them on one side, and on the other, as I said, nine witnesses, most of whom, I think, were upon the train, that stated to you they heard no bell or whistle or warning at all. We cannot instruct you that you are to take the testimony of those witnesses who swore to a positive fact, and not those who swear they did not hear, a fact which they have proven; but we state this as a general rule and general principle of law, and it is an instruction which I am constantly in the habit of giving to juries, — as a general thing, the testimony of witnesses who swear positively to a fact is entitled to more weight than those who swear negatively in regard to it. I do not think it is necessary to go any further. It is for you to believe which of all these witnesses you choose.

A great many authorities have been cited, yet the case is within a very narrow point. I will now proceed to lay before you the law applicable to the cases of collisions by the running of trains, — the trains of railroad companies. And there is no occasion to go outside of our own courts to search for any such cases. A case was tried in this court at the May term, 1870, wherein the law was most intelligently laid down by my predecessor, and it is sufficient for this case, and for other cases involving the same or similar circumstances, and in fact in all cases where negligence in running trains is imputed and contributory negligence is set up as a defense. In this case negligence in driving the train down to and over the public highway crossing at Frogtown, with respect to the non-using of appropriate signals or warnings of danger to people on the highway, is charged against the defendant, and that by reason of it the husband of the plaintiff lost his life; which contention is opposed, on the part of the defendant, by the charge that the deceased himself was guilty of negligence, or want of proper caution on his part, and that such contributed to the fatal accident that befell him. Then we have here imputation of negligence by the defendant, and that it caused the fatal disaster, and answer to it that the deceased contributed to it by want of proper diligence, which is negligence on his part. This case to which I have referred — that of *Patterson v. Railroad Co.*, 4 Houst. 103 — gives the law completely applicable to that case, and, as we think, to this case also. The chief justice said, speaking for the court, — and this is as good an exposition of the law applicable to both sides of the case of the collision as we are acquainted with, — “that the terms ‘ordinary care and diligence,’

when applied to the management of railroad engines and cars in motion, must be understood, however, to import all the care and circumspection, prudence and discretion, which the peculiar circumstances of the place or occasion reasonably require of such servants; and this will be increased or diminished according as the ordinary liability to danger * * * to others is increased or diminished in the movement and operation of them." He then goes on to apply the law thus stated to the case then before the court. Further on he says: "But, on the other hand, it is equally well settled, as a principle of law, that the plaintiff was also bound, at the same time, to use ordinary prudence, care, and diligence to avoid the accident and injury which occurred to him on that occasion; because it is not only an instinct of our nature and a dictate of reason, but a duty which the law imposes with respect to the legal responsibilities of others upon every person, no matter how he may be engaged, or what may be his position, to use ordinary care for his own protection and security against such accidents, and the care and diligence which he is bound to exercise must be in proportion to the danger to be avoided." Then adding, to explain his meaning: "That is to say, he is bound to use such care, prudence, and diligence as a reasonably prudent man, under the peculiar circumstances of the case, would exercise, to preserve himself from being injured."

Now, I make bold to say that a clearer view or exposition of the law of negligence as affecting railroad companies, and those injured by collisions from the movements of their trains, has never been given. It is so clear as to be comprehensible to the most ordinary mind. It is that railroad companies must use due care with respect to the lives and persons of individuals who, in the pursuit of their lawful business, will incur danger from their trains, and that such persons shall, on their part, use like care to avoid such danger. Due care in the case of the companies means, ordinarily, the timely employment of efficient signals or warnings, notifying the approach of trains to public places, such as highway crossings, etc., and in the case of individuals due circumspection, or listening, or both, when practicable, to avoid collision; and the greater the peril to the individual the greater the duty of care by the company, and of prudent and due caution on the part of the individual. At places of great danger, great care must be taken by both parties. This, after all, is but common sense, the force of which must be evident to every one. By

applying this law to the facts of this case, as they have been laid before you by the respective parties, you will be able, I think, to reach a conclusion satisfactory to yourselves, and in the interest of sound adjudication.

Now, it was the duty of the defendant in this action, on that night, as well as at all other times, to make use of all the usual and appropriate means, as bell and whistle, to warn wayfarers who might be passing along the highway, intending to cross this road at the dangerous locality of Frogtown, of the approach of the south-bound train; and it was in no wise absolved from that duty by the act of assembly, which has been stated as operating relief from such duty, for that act is not with respect to the railroad companies, but was intended, as clearly appears from its terms, to compel engineers, or others having, at the time, charge of trains, to perform the duty they were bound to as servants or agents of their employers. The act inflicts punishment upon such persons by indictment and fine, or imprisonment, or both. The intent of the act was to punish engineers and others for not doing their duty, and not to relieve the companies from the common-law duty of taking the usual means to warn people of danger; but neither the neglect of the engineer on that night to obey the statute, nor that of the company to do its duty on that occasion, if you believe from the testimony such neglect existed at all, relieved the deceased in any respect from the duty on his part to take all the care which an ordinarily prudent man would have taken, under the same circumstances, to secure himself against danger from the train, which was then expected to pass at that time, and which from his frequent travel upon that highway he must be taken to have known might go by any instant. The train did not come to the crossing on time, as was to be expected, and might have been seen by looking up the road in time to avoid the collision, if he had looked for it; for there was a clear space of thirty-seven feet before the crossing was reached, and, according to its rate of passage, it took the train about twenty seconds to traverse the rails from the factory to the fatal crossing.

According to the law of this State, as laid down in this court in the case of *Lynam v. Railroad Co.*, 4 *Houst.* 583, the deceased was bound, before he reached that Frogtown crossing, to look for that train.⁽¹⁾ We can never know whether he looked or not. If

1. See the *Patterson* and *Lynam* cases, referred to in the charge to the jury in the case at bar, the cases next reported in this volume.

he did before he got on that crossing, he must have seen it. If he did see it, he must be supposed to have taken the risk of being able to get over the crossing in time. If he did not, then unfortunately he would seem to have failed to exercise the care and caution of an ordinarily prudent man. Whether he did fail or not is a matter for you, in view of all the facts in the case. Now, it is in proof before you by the engineer of the defendant who was running the train that night that at the time the deceased was struck by the train they were moving at the rate of thirty-five to forty miles an hour. The speed before the train reached Armstrong's corner was shown to be usual, — thirty miles an hour. It was afterwards accelerated, and, by the time it reached the Frogtown crossing, it was, according to Engineer Grubb, going from thirty-five to forty miles an hour. It may have attained that increased speed at the factory, only 1,111 feet north of the crossing. Now, it was stated yesterday, by the defendant counsel who last addressed you, that the time required by the train, moving at her usual rate of speed, — thirty miles an hour, — would have been about twenty seconds, or one-third of a minute. The decrease of time, by reason of increase of speed, is a matter of calculation, which you can make for yourselves. Now, taking this fact of decrease of time between the factory and the crossing in connection with the position of Dr. Parvis' buggy at the time it was struck, it would seem that, but for that increase of the speed of the train, the deceased would have passed the crossing in safety; for, according to the testimony of the fireman, the deceased was proceeding at a good rate of speed. Now, we are not prepared, as a matter of law, to say to you that the duty devolved upon the deceased, on that occasion, to anticipate and protect himself against increased speed of the train; but we leave it to you to say whether, taking all the facts and circumstances into consideration, the deceased was guilty, in your opinion, of any want of diligence and due care on that occasion. If you think he was not, then the plaintiff is entitled to your verdict; if you think he was, then she is not. If you find for the plaintiff, she would seem to be entitled to a verdict for such reasonable sum as will compensate her, according to the statement of items contained in the six prayers of instructions. The prayer that I refer to is this: "If the jury shall find a verdict for the plaintiff, then, if she is entitled to damages, they are to estimate the reasonable probabilities of the life of the deceased, Dr. Parvis, and give the

plaintiff such pecuniary damages, not only for past losses, but for such prospective damages, as the jury can find she has suffered, or will suffer, as the direct consequence of death to the said Dr. Parvis."

Jury disagreed.

PERSON ON TRACK STRUCK BY FREIGHT CARS COLLIDING ON SIDING — TRESPASSER — DUTY OF RAILROAD COMPANY — DEGREE OF CARE. — In **PATTERSON v. PHILADELPHIA, WILMINGTON AND BALTIMORE R. R. CO.**, 4 *Houst. (Del.)* 103 (1869), action for damages for injuries sustained by plaintiff by reason of alleged negligence of defendant's servants in coupling cars on a siding of their track, where plaintiff was working for other persons, whereby the cars collided with an old car on which plaintiff was at work, seriously injuring him, the jury rendered a verdict for plaintiff for \$5,000. The court (per GILPIN, Ch. J.), charged the jury, the points being set out in the syllabus of the case as follows:

"A person injured by the engine or cars while wrongfully on the track or siding of a railroad company is without remedy, unless it is proved by affirmative evidence that the servants of the company having the management of them could with ordinary care and diligence have prevented it under the circumstances, or that they wilfully or wantonly did it.

"The terms ordinary care and diligence, when applied to the management of railroad engines and cars in motion, must be understood, however, to import all the care and circumspection, prudence and discretion which the peculiar circumstances of the place or the occasion reasonably require of such servants, and this will be increased or diminished according as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of them.

"But even a person who is rightfully on the track or siding of a railroad company is also bound to use ordinary care and diligence for his own protection and to preserve himself from injury by the movement of its engines or cars, and though injured by them through negligence on the part of the servants of the company having the management of them yet, if he has by his own negligence contributed in any degree to the happening of the injury to him, he cannot recover any damages for it."

COLLISION OF TRAIN WITH CARRIAGE AT PRIVATE CROSSING — DUTY OF TRAVELER. — In **LYNAM v. PHILADELPHIA, WILMINGTON & BALTIMORE R. R. CO.**, 4 *Houst. (Del.)* 583 (1873), action against the railway company for negligently

running a train of cars against a carriage in which the wife of plaintiff, Thomas P. Lynam, was riding and driving across the railroad, and by which she was severely injured, the court (per GILPIN, Ch. J.), in his charge to the jury, held that if the contributory negligence of plaintiff, who is injured in driving upon a private railroad crossing by a passing train of cars, without stopping or looking out and listening before driving upon it, for a train that may be approaching it from either direction, clearly appears from the evidence for him in an action on the case against the railroad company for the injury, the defendant will be entitled to a nonsuit. Under instructions from the court, the jury returned verdict for defendant.

COLLISION OF STREET CAR AND TRAIN AT CROSSING — STREET CAR PASSENGER INJURED — NEGLIGENCE OF GATEMAN — LIABILITY OF RAILROAD COMPANY. — In **WOODIEY v. BALTIMORE AND POTOMAC R. R. CO.**, 8 Mackey (19 D. C.) 542, passenger in street car injured at railroad crossing by collision with train, the facts are stated by MONTGOMERY, J., as follows: "The plaintiffs, husband and wife, sued for her personal injuries and recovered \$1,500. The defendant moved for a new trial 'on exceptions taken and because the evidence was insufficient to sustain the verdict, and also because the damages were excessive,' which motion was denied, a bill of exceptions settled and an appeal taken. The undisputed facts are, that on the morning of February 27, 1886, the wife was a passenger on a 'Four-and-half street' car; that at the intersection of that street and Virginia avenue the car was struck near the rear end by an incoming Baltimore train, upset, and Mrs. Woodiey injured; that at this point the defendant has four tracks guarded by gates and a watchman who was attending the gates on that morning; that the train was about five minutes late; that it was a 'regular scheduled train;' that the watchman who had been on the crossing two or three minutes before the train arrived 'went into his watchman's box and was engaged in cleaning some lamps;' that he heard the 'locomotive's bell ring to approach the crossing;' that he then went out and saw the street car approaching; that he 'turned the gate down as soon as he got out of the box,' but the street car had passed inside." * * * The court then reviewed the evidence of the parties and held that where defendant's watchman was negligent in failing to give the street car driver timely notice of the approach of the train at the crossing, plaintiff could recover for the injuries sustained by the collision, even though the street car driver's negligence contributed to the accident. *Judgment affirmed.*

COLLISION AND CROSSING CASES. — For other District of Columbia cases relating to collisions and crossings, see *JOHNSON v. BALT. & POTOMAC R. R. Co.*, 6 Mackey, 232 (duty of persons operating train to give timely notice of approaching crossing); *BALT. & POTOMAC R. R. Co. v. CARRINGTON*, 3 App. D. C. 101 (person killed at railroad crossing; will not be presumed that deceased failed to look and listen before attempting to cross); *WASHINGTON & GEORGETOWN R. R. Co. v. HICKEY*, 5 App. D. C. 436 (train approaching while street car crossing track, and passenger injured in trying to escape impending danger; case reported in 9 Am. Neg. Cas. 173).

PASSENGER IN EXPRESS CAR INJURED IN COLLISION — CONTRIBUTORY NEGLIGENCE — INSTRUCTION. — In *FLORIDA SOUTHERN R. R. CO. v. HIRST*, 30 Fla. 1 (1892), passenger riding in express car and injured in collision (reported in 9 Am. Neg. Cas. 177), judgment for plaintiff was reversed for erroneous instructions as to application of railroad rules and on the question of damages. On the question of negligence the court ruled that "where a party has inflicted an injury intentionally, or where it has been done through negligence and hence unintentionally, and his conduct in doing it has been wanton or reckless of its injurious consequences, the contributory negligence of the person injured is not a defense to an action brought by him for such injury. The use of the expression 'gross negligence' in a charge to a jury does not of itself define, nor does it include only, that extreme degree of negligence which is wanton or reckless of its injurious consequences, and to which the defense of contributory negligence does not obtain; and cannot be held as having been intended to submit the case to a jury for consideration as one of that character, and particularly so where other charges have recognized contributory negligence as a defense to the action."

MACON AND WESTERN RAILROAD COMPANY v. JOHNSON.

Supreme Court, Georgia, December Term, 1868.

[Reported in 38 Ga. 409.]

PASSENGER STANDING ON CAR PLATFORM KILLED IN COLLISION WITH FREIGHT TRAIN — EXPERT — OPINION EVIDENCE — RULES AND REGULATIONS — DAMAGES — ERRONEOUS INSTRUCTION. — 1. If a passenger on a railroad be injured by a collision of the trains, and the evidence shows that, though the company (or its agents)

was guilty of negligence, yet the party injured could, by the exercise of ordinary diligence, have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the company.

2. If, in such a case, it appears that both the defendant and the plaintiff were guilty of negligence, and it does not further appear, from the evidence, that the deceased could, at the time of the injury, have avoided the consequences to himself of the negligence of the railroad company, or its agents, he is entitled to recover; but it is the duty of the jury to lessen the amount of their verdict in proportion to the negligence and want of ordinary care of the passenger.
3. Where a suit is brought by a widow, for the homicide of her husband, under the 2920th section of Irwin's Code, and there is no fault proven on the part of the deceased, the rule to be adopted for estimating the damages, is: The pecuniary damages to the wife from the homicide, to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation and prospects in life, and when the annual money value of that support has been found, to give, as damages, its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well-established reputation.
4. The opinion of one, who for many years has been a railroad superintendent, in a matter within the scope of his employment, stands upon the footing of the opinion of an expert; but he cannot give his opinions of the object of a railroad company, with which he had no connection, in putting up a particular notice on the doors of its cars.
5. Though opinions are not generally evidence, yet, when the truth sought to be ascertained is matter of opinion, a witness, not an expert, may give his opinion, if he states the facts upon which it is based.
6. A card published by the passengers immediately after a railroad collision, is not evidence, as part of the *res gestæ*.
7. Railroad companies may make reasonable rules for the conduct of their passengers, and a rule that passengers must not stand upon the platform of the cars is such a reasonable regulation (1).

1. *Injured on car platform.* — For actions relating to Persons Injured While Standing upon Car Platforms, see vols. 9 and 10 AM. NEG. CAS., where the same are chronologically grouped, from the earliest period to 1897, and arranged in alphabetical order of States. The Georgia cases appear in vol. 9 AM. NEG. CAS. Subsequent actions on the same topic to date, are reported in vols. 1-9 AM. Neg. Rep., and the current numbers of that series of Reports.

Rules and Regulations. — In Florida Southern R. R. Co. v Hirst, 30 Fla. 1, 9 AM. NEG. CAS. 177, it was held that "a rule of a railroad company requiring

that passengers shall remain in the cars provided for them, and, consequently, that they shall not ride in an express car, or other place of increased danger, set apart for another purpose, is reasonable."

In Ackerson v. Erie R'y Co., 32 N. J. L. 254, 9 Am. Neg. Cas. 557, it was held that where a railroad company adopts all rules and regulations needful for the safety of the passengers, and employs competent agents, whose duty it is to see that these rules and regulations are observed, the company, in case of injury to the passengers, happening by reason of the failure of

8. If such a notice be proven to have been posted in large metal letters, upon the doors of the passenger cars of a railroad company, a passenger will be presumed to know the rules, and if that knowledge be denied, the burden of establishing such want of knowledge is upon the party denying it.
9. In this case, this court feels constrained to reverse the judgment of the court below, overruling the motion for a new trial, made by the plaintiff in error, on the ground that the court erred in its charge to the jury, as to the rule for estimating damages in such cases, and on the further ground, that the verdict of the jury was decidedly against the weight of evidence, if not as to the absence of ordinary diligence on the part of the deceased, to escape the consequences to himself from the plaintiff's negligence, certainly as to the amount of the damages, in view of the rule that where both parties are at fault, the damages are to be diminished in proportion to the negligence and want of ordinary care of the party injured.
(Syllabus by the Court.)

CASE. Motion for new trial. Decided by Judge COLE, Bibb Superior Court, November Term, 1867. The facts appear in the opinion. *Judgment for plaintiff reversed.*

"Arthur W. Johnson was a passenger upon the night passenger train from Macon to Atlanta, over the railroad of said company. The train was followed by a freight train. Some portion of its engine having broken, the passenger train was stopped. Whilst it was stopped, Johnson stood upon the platform of one of its cars, and there remained till the freight train, running into the passenger train, killed him. Thereupon, his wife sued the company for damages."

the agent to perform this duty, cannot be held liable for punitive damages. If, however, the company, as such, is in fault, a different rule applies.

In *Penn. R. R. Co. v. Langdon*, 92 Pa. St. 21, 10 AM. NEG. CAS. 215, it was held that where a person having violated the rule as to riding in baggage cars, of which he had full knowledge, was injured, the railroad company was not liable for the injury.

In *Zemp v. Wilm. & Manch. R. R. Co.*, 9 Rich. Law (S. C.) 84, 10 AM. NEG. CAS. 225, passenger injured on front platform of car, it was held that the questions whether plaintiff had notice that the platform was a prohibited place, and, if so, then whether, under the circumstances, his own act so contributed to his injury as to

exonerate the railroad company, who were clearly guilty of negligence, were for the jury.

In *Railroad Co. v. Hailey*, 94 Tenn. 383, 10 AM. NEG. CAS. 250, it was held that a passenger on a freight train with the conductor's permission, but knowing that he is riding in violation of the rules of the road, assumes the risks of accidents.

In *Houston & Texas Central R'y Co. v. Moore*, 49 Tex. 31, 10 AM. NEG. CAS. 282, it was held that a railway company, as a common carrier of passengers, has the right to make reasonable regulations for conducting its business; and that a regulation that freight and passengers will be carried in separate trains is a reasonable one.

COBB & JACKSON, WHITTLE & GUSTIN, and B. H. HILL, for Macon and Western Railroad Company.

LYON, IRWIN, and B. HILL, for Mrs. Johnson.

McCay, J.—This case comes before the court on a double bill of exceptions. The verdict was for the plaintiff. The defendant moves for a new trial, on the ground, first, of error in the court in admitting and excluding testimony, but mainly on the ground that the court erred in his charge to the jury as to the measure of damages, and on the ground that the verdict of the jury was contrary to the evidence.

The plaintiff moves for a new trial on several minor grounds, but mainly on the ground that the court erred in charging the jury, (this being a suit against a railroad company for the homicide of a passenger), that the plaintiff could not recover if her husband, by the exercise of ordinary care, could have avoided the consequence to himself of the defendant's negligence.

1. It is true that there is a special title in the Code, sections 2978 to 2985, concerning damages by railroads, and that there are several more stringent rules provided against railroad companies, regulating their liability for damages, than are provided against individuals. We do not, however, see any reason why the general principles contained in sections 2917 to 2921 should not apply to physical injuries by railroads. Indeed, it is from section 2920 that the plaintiff in this case gets her right to recover at all. The rule, section 2921, "If the plaintiff, by ordinary care, could have avoided the injury to himself, caused by the defendant's negligence, he cannot recover at all," applies, in our opinion, to all cases, and it is a wise and just rule.

The man who neglects ordinary care to avoid an injury, has no just right to seek redress, if that injury is produced by the negligence of another, and we see nothing in the character of a railroad company which should subject it to damages for an injury caused by the neglect of its agents, where the person injured might, by the exercise of ordinary care, have avoided the consequences to himself. It is objected that this is a harsh rule, and it is even contended that, though in the Code, it is not law, because beyond the power of the compilers, who were not authorized to make law. It is sufficient for this to say that both the Constitutions of 1865 and 1868 adopt the Code, and it is not worth while to discuss the extent of the powers of the compilers. Nor is this rule less hard upon the defendant than was the

common law. Mr. Pierce, American Railroad Law, 272, announces it as a general principle of the common law, "that the rule resulting from all the authorities is that a party suffering injury by a collision cannot recover if he was himself chargeable with a want of ordinary care, and thereby contributed to the injury." And in *Laing v. Colder*, 8 Barr (Pa.) 479, 10 Am. Neg. Cas. 144, it was decided, "that the company is not chargeable for an injury to a passenger which would not have occurred but for his own negligence, or to which his own negligence substantially contributed, notwithstanding the company itself is chargeable with a breach of duty."

Our own courts, previously to the Code, had substantially adopted the same rule, and in 19 Ga. 440 [the Winn case], this court, in effect, announces the rule as it exists in this section of the Code (1).

1. In *MACON & WESTERN R. R. Co. v. WINN*, 19 Ga. 440 (1856), collision between vehicle and train while former was crossing railroad track, whereby plaintiff, a girl about eight years of age, was seriously injured, it was held that if a collision happens at a crossing of a railroad and a public highway, and both parties are negligent, and the plaintiff, in the exercise of common care and caution, could have avoided the injury, he shall not be entitled to recover of the defendant, notwithstanding he also was in fault. Judgment for plaintiff for \$7,000 was reversed for refusal of trial court to grant defendant's request to charge as per ruling in the case.

On a subsequent trial of the WINN case, plaintiff recovered verdict for \$7,000, which, on appeal, was affirmed. It was held that where the safety of a person is put in imminent jeopardy, by the gross negligence or want of ordinary care, by the servants of a railroad, and in attempting to escape injury, is seriously damaged, it is no relief to the company that the person misjudged as to the danger, unless the plaintiff acted from a rash misapprehension as to their true situation.

Opinion by LUMPKIN, J., in which McDONALD, J., concurred; BENNING, J., dissented on the ground that the damages awarded were excessive. 26 Ga. 250 (1858).

MACON & WESTERN R. R. Co. v. DAVIS, 18 Ga. 679 (1855), was an action arising out of the same accident as that in the Winn case, the plaintiff in the Davis case being the administrator of one Boon, who sought to recover the value of a negro man slave, who was killed, and a carriage, the slave being driver of the carriage at the time of the collision in question. In the Davis case it was held that "the proprietors of railroads, when running their engines over crossings, must use reasonable care and diligence, taking into consideration all the circumstances of the case; and whether there has been negligence or not, depends upon the facts of each particular case, and the question is to be decided by the jury; and, notwithstanding the plaintiff may not be without fault, still, if the injury could have been prevented, in the exercise of proper and reasonable precaution on the part of the defendant, and was not, the defendant will be liable."

Our Code, section 2970, requires a railroad company to prove affirmatively diligence on its part, and declares that the presumption is, in all cases, against the company. It also provides, section 2980, that "if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury, in proportion to the amount of default attributable to each of the parties."

The common-law rule was, that however negligent the defendant may have been, yet, if the negligence of the plaintiff contributed to the injury of the plaintiff, he was without remedy. Sedgwick on Damages, 468.

There could be at common law no apportionment of damages. See cases cited; Pierce on Am. R. R. Law, 272-275; Angel on Carriers, 642. A wrongdoer himself, who has contributed to an injury sustained, cannot ask for redress. 8 Man. and Gran. & Scott, 114 (1).

2. Our Code, however, in the case of railroads, adopts a different rule, and provides, in certain cases, for an apportionment of the damages according to the fault of both parties. This, as is said by Judge Benning, in 26 Ga. 250 [the Winn case], was the English Admiralty rule, and, taken in connection with the rule in section 2921 of the Code, is wise and just (2). As a matter of course, these rules are to be taken together. Mere want of ordinary care on the part of the plaintiff will not relieve the defendant, unless he be totally free from fault. Taken together, as we understand the two sections, section 2921 and section 2980, the

1. The citation in the opinion in the case at bar, "8 Man. and Gran. & Scott, 114," is apparently a clerical error. It probably refers to "3 Man. & G. 59; and, same case, 3 Scott's New Rep. 336," the citation of an action (Smith v. Dobson), in the English Court of Common Pleas, decided in 1841.

In Smith v. Dobson, 3 Scott's New Rep. 336; s. c., 3 Man. & G. 59 (1841), an action to recover damages for the upsetting of a barge laden with coal belonging to the plaintiffs, it appeared that a small steam vessel belonging to the defendants called the Water Lily, was proceeding down the river preceded by a larger one called the Ramona, and that in consequence of

the swell occasioned by one or both of these vessels the plaintiff's barge was swamped and the coals lost. The amount of damage was about £80. The jury returned a verdict for the plaintiffs for £20, assigning as a reason for giving that sum only that they did not think the Water Lily to have been the sole cause of the accident. The jury's verdict was for a fourth part of the damage actually sustained, alleging as a ground for so doing that blame was not attributable to the defendants alone, plaintiff's barge not being properly trimmed. The court refused to interfere with the verdict.

2. See abstract of the Winn case, 26 Ga. 250, and 19 Ga. 440, on page 296, *ante*.

rule in Georgia is this: "If the plaintiff, by the exercise of ordinary care, could have avoided the consequences to himself of the defendant's negligence, he cannot recover at all. But in other cases, (that is, in cases where, by ordinary care, he could not have avoided the consequences of defendant's negligence), the circumstances that the plaintiff may have, in some way, contributed to the injury sustained, shall not entirely relieve the defendant, but the damages shall be apportioned according to the amount of default attributable to each." And it seems to us, that the Code thus happily settles a subject upon which there has been some conflict of opinion, and no little display of learning and argument.

3. We have not been able to agree with the court below as to the rule to be adopted for estimating the damages which the wife has suffered by the homicide of the husband. This is a new question not only in Georgia, but wherever the common law is in force. The right to sue at all, depends upon the statute, and the rights of the parties must turn upon its terms. Our first Act gave the right to sue to the administrator, and enacted that, if the estate was insolvent, one-half the recovery should be paid by him to the wife and children. Act 23d February, 1850. The Act of 1856 declared the right to vest in the wife, if any; if not, in the children, and if none, in the legal representatives.

Under these Acts, we are inclined to think it was the intention of the legislature to give a remedy for the full value of the deceased's life. But the Code drops the legal representatives altogether, and gives the right only in case of the homicide of a husband or parent, and only to the widow, or, if none, to the children. Code, § 2920. This change in the law is significant. Why is no remedy given, except in case of the death of a husband or parent, and why are the representatives dropped? Simply, as it seems to us, because it was intended only to give to the wife damages for her loss, or, if no wife, then to the children, for their loss. What, then, is the loss of the wife? Her legal loss? It is that which she was, by law, entitled to from her husband, a reasonable support, according to his condition in life. We are aware that this is but a poor compensation for the loss of a loved one. But would any pecuniary rule meet the actual damages? We trow not, and we do not suppose anything was intended by the legislature, but to supply the loss to the wife of her actual legal rights, by the death of her husband. Anything more than this would set us adrift without chart or compass.

The real value of a life is incalculable, and its actual money value is all that can be estimated. But neither the wife nor the children have any legal right in the earnings of the husband or parent, except for a reasonable support, according to his condition in life. He may, it is true, give them more, or, if he dies without disposing of his estate, they will inherit it. But they have in law, no pecuniary interest, no legal right in his property, except as we have said, for a reasonable support, according to his condition in life. This, they have a right to demand, and this in our judgment, will, upon the whole, best satisfy the peculiar language of the Code, and the history of the legislation in this State on this subject. In estimating the damages, therefore, in a case where the wife is suing for the homicide of her husband, who was without fault, the jury are to inquire what would be a reasonable support for the wife, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably supposed to exist in the future, in view of his character, habits, occupation and prospects in life, and when the annual money value of that support has been found, to give, as damages, its present worth, according to the expectations of life of the deceased, as ascertained by the mortuary tables of established reputation. This rule, as we believe, will approach nearly to a means of measuring the actual legal money value of the life to the wife, though we do not pretend that it will, at all, compensate her for the loss of her husband — that, money, to any amount, cannot do, and it is vain to attempt it.

We have said nothing as to the children, and are free to say that their status, in an action of this kind, has given us much trouble. In the estimate of damages, ought they to be considered? The statute is not clear upon the subject. If the widow recovers, she recovers in her own name, and she holds the recovery in her own right. The children have no claim upon it. She may marry and thus convey it to a stranger, or dispose of it at her pleasure. Why should any claim of theirs be considered in a suit by the wife? On the other hand, if there be no widow, the children may sue, and if she die pending her action, the same shall survive to the children. Code, § 2920. And it is also true that, by the homicide of the husband, an additional moral, if not legal, duty is cast upon her for the support, at least, of minor children. In the decision of the court, at the head of this opinion, we have said nothing about the child or children,

believing that, in a suit by the wife, her loss is the only matter for consideration. The statute is very meagre in its provisions. It does not provide full remedies, and we do not feel authorized to extend it beyond its terms. We hope the legislature may make the law upon this subject more precise. What is so uncertain as children? Does it mean minor children only, or all children? In a matter of such importance, the law ought to be clear, and as the right here given is one wholly the creation of the legislature, we hope it may be more accurately defined by that body. On principles of justice, the widow and children stand on the same footing; yet, as the right of action is given only to the widow, the recovery will be for her sole benefit. We do not feel, therefore, that the rights of the children, or the damage to them, where the suit is by the widow, is matter for consideration.

4. An experienced railroad man, who has made the management of cars, engines, etc., his business for years, is as fairly an expert as one skilled in any other art, and his evidence stands upon the same footing. We think, however, that the explanations by Mr. Adams, of the meaning which the railroad companies with which he had been connected attached to the notice that "passengers must not stand on the platform," was not proper evidence. The words stand for themselves. Suppose he had undertaken to explain by stating that they meant something more, instead of something less than their plain import. Ought that, too, to be evidence? The facts of this case show that the platform is not a safe place, even when the car is not in motion. The old rule is the safe one. Let the words speak for themselves. If the door is opened at all, there is no limit. 1 Greenleaf Ev., § 280.

5. The precise position of Mr. Johnson, at the moment of the collision, is not positively known. He was found on the ground; he had been on the platform very shortly before. The witnesses stated the facts, where they saw him and where he was found. It is sometimes very difficult to draw the line between what is evidence, as a fact, and what is a conclusion of the witness. Much of what we state as fact is, in truth, only the conclusion of our minds from very conclusive evidence. The statement that a man remained an hour in a room may safely be made by one who saw him go in and come out, and who, having good opportunities, failed to see him come out in the meantime, and

yet after all, it may be, and is, a mere conclusion. We think the opinion of the witness is not evidence. If the witness state the presence of the deceased on the platform, at the moment of the collision, as a fact, and it afterwards appear that this is only his conclusion, from his presence there immediately before and his position afterwards, we think his evidence ought not to be excluded. His statement of the fact is weakened, it is true, but it is often very difficult to draw the line, where, in such a matter, fact ends and opinion begins. We do not think there is any danger that the jury should be misled. If this statement is only given as opinion, it is inadmissible.

6. The card was, without doubt, inadmissible. All the parties to it were competent witnesses. It might be used, perhaps, to contradict or qualify the evidence of any witness who signed it if proper foundation were laid, as in case of other statements, but not as original evidence. We know of no rule that justifies its admission. It is not even the statement of one of the parties to the issue. As a part of the *res gestæ*, it must have been during the occurrence or so nearly coincident as to be free from all suspicion of afterthought. Code, § 3720. This was next day, and after much dispute and crimination, and, as the other evidence shows, against the first impressions of the passengers.

7. The liability of a common carrier, for injury to a passenger, is somewhat different from his liability for goods. The latter he stores away at his own discretion, the former is a sentient being, and has certain duties of his own to perform. The company may make reasonable rules to regulate the conduct of its passengers, and it is the duty of passengers to comply with those rules. Code, § 2043. More especially is this true when the rule is for the passenger's own safety. The platform, as is plain to the meanest capacity, is not made to stand upon. The company provides seats, and a shelter for its passengers, and the platform is, as to them, but the passway to their proper place; and it is a reasonable and proper rule, which the company may prescribe, that passengers should not stand upon the platform. It is a rule for the railroad's own convenience; passengers are in the way, a hindrance to the proper management of the train, in that position. It is also true, that it is a place of danger. Whilst the cars are running it is emphatically so, but even when the cars are not in motion, it is an unsafe place.

8. The evidence of the notice was very strong; sufficient to cast the onus of want of knowledge on the plaintiff. Indeed, at this day, considering the familiarity of all classes with railroads, and the evidence which the very nature of the case offers, it would seem that, *prima facie*, every person ought to know that the platform is not a passenger's place, except to pass over. Suppose one were to stand on the steps, or mount the railing, or get on the top of the car, would not the presumption be against him?

We cannot but think that the jury in this case have not given due consideration to the negligence of the deceased. The evidence is conclusive that he was on the platform, and that his position was, in fact, the occasion of his death. There is evidence, too, that he was warned by one of the company's employees of the impending danger, in time to have avoided the consequences; others did avoid it, under the same warning. We are not disposed, however, to hold a man, under such circumstances, to the same coolness and wisdom of action as after the event, and as calm spectators, we may think we would have made use of. Something, perhaps much, must be allowed for alarm and confusion and temperament. We do not, therefore, hold that, under the evidence, it is clear he could have avoided, by ordinary care, the consequences of the defendant's negligence. We do think, however, that though the company was at fault, the deceased was also very careless, nay reckless. He had no business on the platform; it was a place of danger, and always is. It was known to him that a train was coming. He was warned by several of the danger, and ordered by one of the company's employees to get off, as danger was imminent.

9. After the warning, and after he heard the coming train, a passenger went into the car, got his valise, came out, again warned the deceased, got off the train, went to the side of the track, saw the coming train, and again, in a loud voice, gave warning; and yet deceased, foolishly or recklessly, stood his ground. It is, too, a significant fact that he had been drinking, and was on the platform with his hat off. We think both parties were at fault, and under section 2980 of the Code, the damages ought to be diminished by the jury, in proportion to the fault of each. We do not think the jury has done this. We would not measure their verdict with accuracy. The jury are the judges of the facts, and it is only when they are so wide of the mark as to

indicate passion, mistake, or some error, based upon misunderstanding of law, that a court ought to interfere. We think, in this case, under the evidence, as it is before us in the record, the jury have either mistaken the law, or have acted under the influence of passion, natural, perhaps, in view of the parties, but still illegal. In view of all the facts, and of the law, as we understand it, we think the verdict is wrong, and the damages, under the evidence, excessive.

Judgment reversed.

THE CENTRAL RAILROAD V. FREEMAN.

Supreme Court, Georgia, October Term, 1885.

[Reported in 75 Ga. 331.]

PASSENGER INJURED IN COLLISION — EVIDENCE — BURDEN OF PROOF — DUTY OF CARRIER — INSTRUCTIONS — PRACTICE —

- VERDICT. — 1. The court committed no error in stating the issues to the jury, when he informed them that the plaintiff claimed that the injuries received disabled him from performing his ordinary labor.
2. There was no error in charging to the effect that the burden was on the plaintiff to sustain his allegations as to the injury sustained by him; that, to entitle him to recover, he must produce evidence sufficient to satisfy the jury that he has sustained an injury, and that such injury was the direct and proximate consequence of the defendant's negligence; for, to constitute an actionable tort, there must be damage to the plaintiff and negligence by the defendant, causing the injury. Especially is this true where the question of negligence was fully and fairly submitted to the jury, and they were instructed that they only could find the fact.
 3. The charge excepted to in the third ground of the motion for new trial was not error, and did not express any opinion on the facts, when taken in connection with its context. In stating the issues, to say that a party "brings evidence to show," etc., is not to express an opinion as to what has been proved.
 4. There was no error, after charging that a railroad, as a common carrier, was bound to use ordinary diligence to transport passengers safely, and to protect them from injury, in adding that, where a casualty occurred, it would authorize an inference that it was occasioned by defendant's negligence, and from it the jury might presume negligence.
 5. The court did not go outside of the case made by the pleadings in charging that it was the duty of the defendant to provide a safe track, comfortable cars, sufficient couplings, coupling-pins, etc. There was nothing in this to mislead the jury or divert their attention from the real issues in the case.
 6. There is nothing objectionable in the charge excepted to in the sixth ground of the motion for a new trial; it is as favorable to the defendant as it could, with legal propriety, have been, and pointed out clearly the care and diligence that would excuse the defendant for the use of defective machinery in the running and use of its road and cars.

7. There is nothing in the seventh ground of the motion. It does not appear how the court failed to confine the jury in their finding to the special matters of negligence set out and relied on by the plaintiff in his pleadings.
 - (a) Vague and general exceptions make no issue of law that can be passed upon by this court.
 8. The courts go very far to sustain verdicts and to avoid setting them aside. They must cover the issues made by the pleadings; but before they will be set aside for a failure in this respect, the deficiency must be made apparent. They are to have a reasonable intendment and to receive such a construction as will prevent their being avoided except from necessity; and to obviate this, they may be so amended as to make them conform to the pleadings; and where part is illegal, that may be written off. The verdict in this case covers the issues.
 - (a) Where there are several pleas filed, a verdict for the defendant must show on which of the pleas it is rendered; but where the jury found for the plaintiff, it was, in effect, a finding against all of the pleas.
 9. The declaration in this case alleged both general damages and also special damages, consisting of charges for attendance of physicians, medicines, etc. The defendant had paid certain charges of this character, and a receipt of an itemized bill was taken. It was in dispute whether or not this was a complete settlement of all such claims or only those to the date of the receipt. The charge fully submitted the facts, and there was no authority for finding separately on such questions.
 10. Although this court, if it occupied the place of a jury, might not have found the verdict which was found, yet it was not so excessive as to show plainly that the jury were influenced by bias to the plaintiff or prejudice against the defendant, or that they misapprehended the case; and their finding having been approved by the presiding judge, this court will not interfere especially after a second verdict for the plaintiff.
- (Syllabus by the Court.)

APPEAL from judgment for plaintiff in the Bibb Superior Court. Reported in the decision. *Judgment affirmed.*

LYON & GRESHAM, and A. R. LAWTON, for plaintiff in error.

HILL & HARRIS, and BACON & RUTHERFORD, for defendant.

Hall, J.— This case has been twice tried; both verdicts were in favor of the plaintiff; the first was set aside, and a new trial granted. There was no appeal to this court from the grant of the first new trial, as the plaintiff alleges, in defense to the rule laid down as governing such cases.

The defendant asks that the second verdict be set aside and a new trial granted, upon the following grounds:

1. Because the court, in stating to the jury the claims made by the plaintiff in his case for injuries alleged to have been sustained by him, said, among other things, that if the injury received by

the plaintiff "disabled him from ordinary labor," etc., — the plaintiff not having so claimed, and the statement thereof being calculated to mislead the jury.

2. Because, after charging the jury that the burden of proof is on the plaintiff to sustain the allegation, and that, to entitle him to recover, he must produce evidence sufficient to satisfy the jury that he has sustained an injury, the court then erred in charging, "and that that injury was the direct proximate consequence of the negligence of the defendant."

3. Because the court, in stating to the jury, in his charge, "to support his allegation the plaintiff brings evidence to show, 1st, the relation he bore to defendant, in order to raise a duty on defendant's part towards him; 2d, the casualty and injury; 3d, what ought to have been done by defendant, and what actually was done."

4. Because the court, after charging that the defendant, as a carrier of passengers, was bound to use extraordinary diligence on behalf of itself and agents to safely transport the plaintiff and to protect him against injury to his person, erred in charging, "Where a casualty is shown to have occurred, it would authorize an inference that they were negligently done." Again, "and so, when the defendant owed a special duty of care to the plaintiff, a casualty is evidence from which the jury is authorized to presume negligence." More especially are these propositions erroneous when applied to issues and different special grounds of negligence set out and relied on in the plaintiff's declaration, from each of which it was alleged the injury to the plaintiff resulted.

5. Because, having reference to the pleadings and issues in this case and the law, the court erred in charging the jury that "the measure of defendant's duty is to provide a safe track, comfortable cars, ample couplings, coupling-pins, and all the other appliances necessary for the safety of its passengers, and that its agents or servants operate them in a careful and skilful manner, so as to render it reasonably certain that the passenger will suffer no injury to his person while being carried over its road. If the defendant failed to exercise the degree of care required of it in these respects, it is chargeable with neglect, and is liable in damages for any injury resulting therefrom."

6. Because the court erred in charging the jury that if, in selecting and furnishing material, machinery and all appliances

necessary for these purposes, the defendant, acting through its officers and agents (as all corporations must), used proper care and diligence to ascertain by proper inspection and tests whether or not the machinery and appliances were sound or defective, and furnished none but what appeared to be free from defect, and were adapted to the purposes intended, so far as such examination enabled them to determine, then they filled the measure of their duty in this respect, and would not be liable for any injury which may have occurred; and this is the rule, notwithstanding the casualty may have resulted from actual defect in any of the appliances so furnished (as in a coupling pin), provided such defect, if it existed, was so hidden as not to be discernible by careful examination.

7. Because the court erred in not confining the jury in their finding to the special matters of negligence set out and relied on by the plaintiff in his pleadings.

8. Because the verdict of the jury does not meet and cover the issues made by the pleadings on the part of the plaintiff in this: 1st, The plaintiff alleges the injury was caused by the breaking of a defective coupling pin; 2d, by the breaking of a coupling pin by an improper and unnecessary jerk of the train, by the engineer's sudden application of steam; 3d, by failure of the company to send a messenger far enough back on the track after the stopping of the train to warn the following freight train in time to stop before reaching the standing train, having time enough to do so; 4th, by the failure to make the proper connections after the parting of the trains, and moving the whole train out of the way before the following train reached that point, having time to do so; 5th, by the trains getting out of time, off their regular schedules and all mixed up on the same schedule; 6th, because the train on which plaintiff was a passenger was behind time and not on its schedule at the time of the collision. The verdict does not specify on which of these grounds of negligence the finding was made, or on which of them the defendant was at fault.

9. Because the verdict does not cover the issues made by the defendant's special plea of having fully settled with and paid the plaintiff for all special damages sustained by plaintiff as set out in plaintiff's declaration, other than such personal or bodily injuries, if any such were sustained by him. It, the verdict, fails to show how much damages are awarded for the actual

personal or bodily injuries, if any, or how much for the special claims set out and sued for.

10. Because the court erred in charging the jury, at the request of the plaintiff, as follows: "The defendant files a special plea as follows: 'That for all special damages sustained by plaintiff, as alleged in his declaration, if any was actually sustained, paid out or sustained by him other than such personal or bodily injuries, if any such were sustained by him, this defendant has fully settled with and paid said plaintiff for all such, and at his special instance and request.'

"If you believe from the evidence that the amount paid by the defendant, to wit, about \$78.00, if that was the amount, was in full of all special damages, such as doctor's bills and medicines, and other special damages, then you will find for the defendant on that plea as to such special damages, and not include anything on that account, if, in your verdict, you should find any amount of damages for plaintiff.

"The plaintiff, on the other hand, contends that the amount of \$62.75 (if that was the amount paid on the bill made out December 13th, 1883), was for damages to personal effects which are not now sued for, and that the expenses for medicine and doctor's bills in that bill were only up to date of that bill, and that the payment made did not cover or include special damages, such as bills for medicine and doctor's bills, subsequently incurred.

"If you find from the evidence that the payment made was only for such special damages up to date, and not in full of such expenses as were subsequently incurred, then I charge you that you would be authorized to find for the plaintiff the amount of such expenses or special damages subsequent to said payment (as the evidence shows you to have been incurred, as it shows them), provided the evidence satisfies the jury that such expenses were incurred as a necessary and direct consequence of any injury sustained by the negligence of defendant, and having arrived at the amount of such expenses, you should include it in the amount of damages you may award if you should award any amount of damages in favor of the plaintiff." The defendant insisting that the jury, under the issues made by the pleas, should have found either for the defendant on this plea, or if for the plaintiff, then they should have found the amount of such special damages, and the court erred in directing the jury to include such amount, when found, in the damages they might find for the plaintiff.

11. The verdict of the jury was illegal and incomplete, because there was no special finding on this plea of defendant.

12. The verdict of the jury was contrary to the evidence.

13. The verdict was contrary to law.

14. The verdict was excessive as to the amount of damages found. Upon each and all these grounds a new trial was refused, and the defendant excepted.

1. The court committed no error in stating the issues to the jury, when he informed them that the plaintiff claimed that the injuries received disabled him from performing his ordinary labor; this is made one of the grounds of damage, if not in the original, at least in the amended declaration, and had reference only to such labor as he was accustomed to perform in the discharge of his usual avocations.

2. In addition to what is excepted to in the second ground of the motion, and as a part of the same sentence, the court charged the jury, "The burden of proof is on the plaintiff to sustain his allegations as to the injury, and to entitle him to recover, he must produce evidence sufficient to satisfy them that he has sustained an injury, and that such injury was the direct and proximate consequence of the defendant's negligence; for, to constitute an actionable tort, there must be damage to the plaintiff and negligence by the defendant, causing the injury." We are unable to discover the least error in this charge, especially when the question of negligence was fairly and fully submitted to the jury, and they were instructed that they only could find this fact.

3. We do not think that the charge excepted to in the next ground of the motion is amenable to the criticism made upon it by the defendant, especially when taken in connection with what immediately preceded and followed it; the judge did not thereby express any opinion as to what had or had not been proved; indeed, he was very careful, throughout his entire charge, to disclaim any such purpose. The paragraph in question occurred in stating the issues, which were fully and fairly submitted, and was merely introductory to the main charge; besides, to say that a party "brings evidence to show," is not an affirmation that it does show the facts stated, and is quite distinct from, and opposite to, an assertion that he brings facts that show such and such things; the one form of expression merely designates the purpose for which the evidence is introduced; the other is a positive declaration that it establishes those facts.

4. There was no error, after charging that the defendant, as a common carrier, was bound to use extraordinary diligence to transport passengers safely and to protect them from injury, in adding that, where a casualty occurred, it would authorize an inference that it was occasioned by defendant's negligence, and from it the jury might presume negligence. It is true that the section of the Code, 2067, imposing this strict rule of diligence on carriers of passengers, does not in terms declare that, in all cases of injury to them — as does section 3033 of the Code, which prescribes "all ordinary care," etc., to railroad companies and their agents to prevent injuries by the running of their trains to persons, stock and property, "the presumption is in all cases against them," but it does contain what is equivalent in these words: "But he" (the carrier), "is not liable for injuries to the person after having used such (extraordinary) diligence." Whether this is a correct view is quite immaterial, since the common law, which imposed the same rule of diligence, asserts in unequivocal language, that when an injury is shown, the plaintiff proves a *prima facie* case of negligence against the party having the railroad and train under his exclusive management. *Carpue v. London & Brighton Railway Co.*, 5 B. Q. 747 (5 Adol. & Ellis, N. S. 747, 48 Eng. C. L. R. 747), cited with approval in *Skinner v. London, Brighton & South Coast Railway Co.*, 5 Exch. R. 787 (1). It would seem anomalous to relieve a person of whom

1. The facts in *Carpue v. London & Brighton R'y Co.*, 5 Q. B. 747, were: A railway company was empowered to make a railway, which all persons were to have the liberty of using with carriages, on payment of tolls. The company was also empowered to provide locomotive engines, and charge for their use, and to use locomotive engines and carriages for the conveyance of passengers, and to charge for such conveyance, in addition to the tolls, within a limited amount. It was enacted that no action should be prosecuted against any person for anything done or omitted to be done, in pursuance of the act, or in the execution of the powers given by it, without twenty days' notice in writing. A declaration against the company charged that they were

owners of the railway, and of carriages used for the conveyance of passengers along it for reward; that the plaintiff became a passenger in one of the carriages, for reward to them; and it became their duty to use due care in conveying him. Breach, that they did not use due care in conveying him, but so negligently conducted themselves in carrying him, and managing the carriage in which he was passenger, the train to which it was attached, and the engine, whereby it was drawn upon the railway, that the carriage was thrown off the rails, and the plaintiff injured. *Held*, that no notice of action was necessary, the company being sued in their capacity of carriers, and not for anything done or omitted under the act. *Held*, also, that a passenger

was required a higher degree of diligence from a burden imposed on one from whom was exacted a lower degree, and the distinction here attempted to be drawn has never, that we are aware of, been recognized by our own courts.

5. The court did not go outside of the case made by the pleadings in charging that it was the duty of the defendant to provide a safe track, comfortable cars, sufficient couplings, coupling pins, etc.; there was nothing in this to mislead the jury or divert their attention from the real issues in the case.

6. There is nothing objectionable in the charge excepted to in the sixth ground of the motion for a new trial; it is as favorable to the defendant as it could with legal propriety have been, and pointed out clearly the care and diligence that would excuse the defendant for the use of defective machinery in the running and use of its road, cars, etc.

7. There is nothing in the seventh ground of the motion. It does not appear how the court failed to confine the jury in their finding to the special matters of negligence set out and relied on by the plaintiff in his pleadings. Such vague and general exceptions make no issue of law that can be passed upon by this court. They specify no decision complained of and set forth neither plainly nor otherwise any error whatever.

8, 9. The verdict of the jury meets and covers every issue made by the pleadings on the part of the plaintiff, as specified in the eighth ground of the motion, as well as those made by the defendant's special pleas, as set out in the ninth ground of the motion. The courts go very far to sustain verdicts and to avoid setting them aside. It is true that they must cover the issues made by the pleadings (Code, § 3559), but before they will be disturbed for a failure in this respect, the deficiency must be made apparent. *Gunn v. Barrett*, 69 Ga. 689. They are to

injured on a railway proves a *prima facie* case of negligence against the company, by showing that, when the accident occurred, the train and railway were exclusively under their management.

In *Skinner v. London, Brighton & South Coast R'y Co.*, 5 Exch. 787, the declaration alleged that the plaintiff was a passenger in defendant's train, and that in consequence of the carelessness, negligence and want of skill

of the company and their servants, the train ran against another train on the line, whereby plaintiff was injured. At the trial it appeared that the accident was occasioned by the train running, in the dark, against another train which was standing still at an intermediate station on the line. *Held*, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the company.

have a reasonable intendment, and to receive such a construction as will prevent their being avoided except from necessity. Code, § 3561. To obviate this, they may be so amended as to make them conform to the pleadings, and where partly illegal, that part may be written off. *Steed v. Cruise*, 70 Ga. 168; *Carter et al. v. Lipsey*, 70 Ga. 417.

In connection with the foregoing grounds of the motions for a new trial, the eleventh ground should be considered as germane to them. It is true, where there are several pleas filed, a verdict for the defendant must show upon which of the pleas it is rendered. Code, § 3560. The verdict in this case was for the plaintiff, and being for him, it is to be presumed it was the intention of the jury to find against all of the defendant's pleas; indeed, such a verdict renders it impossible that they should have found in favor of either of them; it necessarily negatives each and all of them. *Jernigan v. Carter*, 60 Ga. 131.

10. The charge of the court was full, fair and explicit as to the matters embraced in the tenth ground of the motion. The declaration alleged both special and general damages; the special damages consisted of certain claims for the attendance of physicians, medicines, etc., administered to plaintiff. There was no charge for damage done to personal property by the casualty. They, together with certain charges for medical attendance, had been paid by the defendant, and plaintiff had receipted for the amount so paid, and furnished the items that made up the aggregate for which he so receipted. The defendant pleaded that this was a settlement in full of all such claims, as well such as were past as those incurred after the date of the receipt. This the plaintiff controverted, and showed from the items covered by the receipt that the physician's bill and the charge for medicine were only "to date." Every fact bearing upon these disputed points was properly submitted by the clear, explicit, comprehensive and methodical charge of Judge Hutchins to the jury. It is true that he did not instruct them that they should find separately as to the different kinds of items going to make up the damages which were claimed by the plaintiff, and had he done so, we think it would have been error. There were no such issues as required the jury to find a special verdict, or to mold it in the same manner as a decree in equity. Code, § 3562. There were no equitable pleadings to take the case out of the general rule that it must

cover the issue made by the pleadings, and must be for the plaintiff or defendant. *Id.*, § 3559.

11. The general grounds that the verdict is contrary to law and evidence, that it is decidedly and strongly against the weight of evidence, without evidence to support it, and that the damages found are excessive, make the only remaining questions to be considered. It may be, that had we been on the jury, we could not have consented to such a finding, but in reviewing their action, we cannot assume their functions and direct them to do what they should have done; especially is this the case where there have been two concurrent findings, and the judge who presided at the last trial committed no error against the party complaining, and does not feel authorized to disturb the verdict, at least where there is evidence to sustain it, albeit the weight of evidence may be against it. These are rules too long established and too generally acquiesced in to be departed from, except for grave causes. The finding of damages may be heavy, yet it is not so excessive as to plainly show that the jury was influenced by bias to the plaintiff or prejudice against the defendant, or that they misapprehended the case they were called upon to try. The plaintiff's own testimony made out a case of very serious injury, which was undoubtedly modified to a considerable extent by other facts in evidence, coming from his own witnesses, and even by his cross-examination (for the defendant introduced no testimony), both as to the character of injury and its probable duration, and while, if we had the power, we would willingly modify this finding, yet we have too often held that we possessed no power, either to reduce damages in such cases, or to interfere with the conclusion of the jury as to the credit to be given to the witnesses, to now depart from these well-settled principles. We are, therefore, compelled, however reluctantly, to uphold this verdict; but had there been the least error in any of the rulings or charges of the court, affecting this result, we should have availed ourselves of it to set the verdict aside and to give the defendant another hearing.

Judgment affirmed.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY v. MARKENS.

Supreme Court, Georgia, October Term, 1891.

[Reported in 88 Ga. 60.]

PASSENGER IN PUBLIC HACK INJURED IN COLLISION WITH TRAIN AT CROSSING — NEGLIGENCE OF DRIVER — IMPUTED NEGLIGENCE — INSTRUCTION. — 1. Where there is no evidence that a passenger in a public hack knew of danger from an approaching train on a public crossing, the judge may so state to the jury, and may say that there is no evidence of any failure in duty on the part of such passenger to avoid the injury.

2. In the case of a female passenger in a public hack, a charge to the jury as follows was correct: "I do charge you that the negligence of the driver, if he was negligent, is not imputable in law to her. A person who hires a public hack, and gives the driver directions as to the place where he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts of negligence, or prevented from recovering against the railroad company for injuries suffered from a collision of its train with the hack, if the same was caused by the concurring negligence of both the manager of the train and the driver of the hack. The only negligence on the part of the driver which will defeat or otherwise affect the right of Mrs. Markens to recover is embodied in the following proposition: If the negligence of the driver was the sole cause and the real cause of the collision, she cannot recover. If the driver and the manager of the train were guilty of negligence, both concurring to bring the collision about, such negligence on the part of the driver cannot have the effect either to defeat or diminish the plaintiff's right to recover."
3. A female passenger in a public hack is under no duty to supervise the driver at a public crossing, nor to look or listen for approaching trains, unless she has some reason to distrust the diligence of the driver himself in respect to these matters.
4. The statute requiring the checking of trains and ringing of bells in approaching public crossings is applicable to this case, without reference to the distance from the crossing to the point at which the train started (1).

1. "*Blow-post law.*" — The statute referred to in the case at bar is known as the Georgia "Blow-Post Law" (Acts of 1851-2, 1859, and 1875, and is incorporated in the Georgia (1895) Code, §§ 2222-2224, relating to operation of railroads, which sections are as follows:

§ 2222. There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the

engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

§ 2223. Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor.

5. Though the court committed some slight errors in ruling upon the minor points of the case, as set out in the motion for a new trial, there was no error in refusing a new trial upon any of the grounds stated in the motion. (Syllabus by the Court.)

APPEAL from judgment for plaintiff in the City Court of Atlanta. The facts appear in the opinion. *Judgment affirmed.*

"Mrs. Markens sued for damages and obtained a verdict, and the railroad company's motion for a new trial was overruled. The charge ruled upon in the first division of the decision was as follows: 'There is no evidence whatever in this case that Mrs. Markens was herself guilty of any contributory negligence in the transaction, or, if the defendant is shown to have been negligent in the legal sense, that she could by due care on her part have avoided the consequences to herself of such negligence. I do not, therefore, feel called upon to charge you anything upon the point of the plaintiff's own negligence, the negligence of Mrs. Markens herself.'

"The injuries were caused by the defendant's switch engine with eight or ten cars being backed over a public street crossing in Atlanta (this crossing going over a number of railroad tracks) and striking a public hack in which the plaintiff was traversing the street. The negligence charged against the company was, in shoving the cars at a rate of speed higher than that allowed by the city ordinance, in not tolling the bell or checking speed as the crossing was approached, and in giving no warning, by flagman or otherwise, of the approach of the train. The defendant contended that the proximate cause of the collision was the negligence of the driver of the hack, and that the plaintiff was or could have been cognizant of the same but did not object to it, and was therefore chargeable with it."

DORSEY, BREWSTER & HOWELL, for plaintiff in error.

HOKE & BURTON SMITH and J. R. WHITESIDE, for defendant in error.

§ 2224. If any engineer neglects to blow said whistle as required, and to check the speed, as required, he is guilty of a misdemeanor: Provided, that within the corporate limits of the cities, towns and villages of this State, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in such corporate limits, but in lieu thereof the engineer of said locomotive shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive, and on failure to do so, the penalties of this statute shall apply to such offense.

Lumpkin, J. — 1. While a judge is forbidden to express or intimate his opinion concerning a question of fact about which there is any doubt whatever, he may with propriety say to the jury that there is no evidence to support an alleged fact, when such statement is unquestionably true. The object of section 3248 of the Code is to prevent judges from interfering with the functions of juries in determining contested issues of fact when there is proof on both sides; but when an alleged fact is entirely unsupported by evidence, the judge may aid the jury by so informing them, thus relieving them of that much difficulty in reaching a correct conclusion in the case.

2, 3. Whatever the law formerly may have been, it is now well settled that the propositions contained in the charge of the court below quoted in the second head-note are correct and sound. So well are we convinced of this, we deem an elaborate discussion of the questions involved unnecessary. In the American and English Encyclopædia of Law, vol. 4, p. 83, we find the following: "It is now the rule in the United States Courts, in England, and in most of the States of the United States, that the contributory negligence of a carrier is not attributable to a passenger." In volume 16, p. 447, of the same work, it is stated that: "There can be no such thing as imputable negligence, except in cases where that privity which exists in law between master and servant and principal and agent is found. In order for the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation of privity to the negligent person that the maxim *qui facit per alium facit per se* is directly applicable. It follows that all the cases in which the negligence of one person has been imputed to another in the absence of just this relation of privity are wrongly decided, and such is the effect of overwhelming recent cases." See also *Flaherty v. Northern Pa. R'y Co.* (Minn.), 40 N. W. Rep. 160; *Becke v. Mo. Pac. R'y Co.*, 106 Mo. 544; *Little v. Hackett*, 116 U. S. 366, and authorities cited therein. And particularly see note by reporter (Irving Browne) to case of *Borough of Carlisle v. Brisbane*, 57 Am. Rep. 488 to 511, inclusive, which treats of the subject in a most comprehensive manner. Also the following text-books: *Deer. Neg.*, § 27; 1 *Shear. & R. Neg.* (4th ed.), § 66; *Whit. Smith, Neg.*, 405-407; *Beach, Contrib. Neg.*, §§ 32-36; 1 *Thomp. Neg.*, § 38; *Thomp. Car. of Pass.* 284 *et seq.*; *Cooley, Torts*, 684; *Add. Torts*, § 33; *Whart.*

Neg., § 344a. These citations might be multiplied indefinitely, but even a casual examination of those above mentioned will suffice to establish the rule laid down by the court below. It will also appear from the foregoing authorities, and is entirely consistent with every-day experience, that a female passenger in a public hack may trust that the driver thereof will exercise proper caution and diligence in avoiding collisions with railroad trains or other things which would naturally result in injury to the vehicle or its occupants. If such driver were drunk, plainly incompetent to manage his team, or manifestly reckless, or if for any other reason it was apparent to the passenger that she could not safely rely upon him, probably the duty would be upon her to supervise his conduct, and compel him, if possible, to observe the requirements of ordinary care and prudence in the management of his vehicle, or else leave the same. No reason why the plaintiff should do either appeared in this case, and we therefore think she was under no obligation to overlook or undertake to control the driver's movements, or get out of the hack.

4. Section 708 of the Code, relating to the erection of blow-posts, the blowing of whistles, and the checking of trains in approaching public crossings, was by the Act of 1875 (incorporated in section 710 of the Code) modified, so far as cities, towns, and villages are concerned, by dispensing with the posts, by substituting the tolling of bells for the blowing of whistles, and by requiring engineers to signal the approach of their trains to public crossings, no matter whether such trains were put in motion at a distance of 400 yards from such crossings or at a point less than that distance. We do not mean to say that the act in precise terms makes these changes, but it seems unquestionable that they were intended to be made thereby. In the very nature of things, the legislature could not have intended that the approach of trains to public crossings in towns and cities should be signaled only when the train began to move at a point 400 yards or more distant therefrom. The absolute absurdity of such intention of the legislative mind shows conclusively that it did not exist. The purpose of the act undoubtedly was to protect persons and property on street crossings in towns and cities, and this could not possibly be accomplished if warnings of the approach of trains and locomotives need be given only when they were set in motion nearly a quarter of a mile from any particular street crossing in question. The law meant that in towns and

cities engineers and other persons in control of trains should always be cautious in approaching crossings, and have their powerful machines under such control as in every instance to be able to prevent collisions in such places. That this court has so regarded and construed the law is evident from its rulings in the following cases: *Atlanta & West Point R. R. v. Wyly*, 65 Ga. 120; *Georgia R. R. v. Carr*, 73 Ga. 557; *Central R. R. v. Russell*, 75 Ga. 810; *Western & Atlantic R. R. v. Young*, 81 Ga. 417; *Georgia Midland & Gulf R. R. v. Evans*, 87 Ga. 673. Numerous other decisions of this court might be cited, but the above will suffice. The case of *Morgan v. Central R. R.*, 77 Ga. 788, even if correct in holding that section 708 of the Code does not apply to trains operating between points where blow-posts are or should be located, and public crossings, is not applicable here, because in that case the injury did not take place in a city, town, or village, and the case was not, therefore, within the Act of 1875, above mentioned.

5. The motion for a new trial contains thirty-five grounds. We have carefully considered all of them, and find that the court did commit some slight errors in its rulings upon questions of minor importance, but none of them are sufficiently serious to authorize or require the granting of a new trial. The controlling questions in the case are those which we have already discussed, and, the court having ruled correctly upon these, we are of the opinion that the judgment below should be, and accordingly it is, affirmed.

FREIGHT TRAIN OBSTRUCTING STREET — PERSON INJURED ATTEMPTING TO CLIMB OVER CARS — PROXIMATE CAUSE — RAILROAD NOT LIABLE. — In *MONTGOMERY v. EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO.*, 94 Ga. 332 (1894), appeal from dismissal of action, the declaration alleged "that plaintiff is a physician and dependent upon his profession and practice of medicine for support and maintenance, and that defendant has damaged him \$10,000 by reason of the following facts: On October 18, 1887, he bought of defendant a ticket on its road from the town of Chauncey (of which town he was a citizen and resident) to the city of Atlanta, intending to become a passenger on its train due at Chauncey about two o'clock A. M. Shortly before the time for the train to arrive, he went to the depot where defendant's trains customarily stopped for passengers. The train on which he was to become a passenger was several hours late.

The night was dark; it was raining, and the depot was closed. Defendant had failed to provide lights at and around the depot, so that persons could see and protect themselves against injury in the rain and darkness; and defendant had standing on its side-track in front of the depot one of its freight-trains which extended many hundred feet above and below the depot, and completely blockaded and obstructed the public street at the depot, and prevented foot travelers and other passers from crossing at the public crossing over the railroad tracks. While waiting for the passenger train, plaintiff had important business and was wet and cold, and went to warm and dry himself, when he was called to the other side of the railroad from where he was. It was dangerous to go around either end of the freight train (which had been standing there many hours), by reason of the steep embankments, ditches, gullies, holes and precipitous declines on either side of the railroad track at either end of the freight train. To avoid said dangers, plaintiff, in company with others, some of whom were employees and officers of defendant (who thus had knowledge of all the facts and circumstances), in order to go where he desired endeavored to cross the freight train at the place where it blockaded the crossing, this being the most advantageous crossing offered, by reason of said blockade; and plaintiff used all possible care and diligence in making said crossing, and was entirely free from fault, and the accident resulted from the failure of defendant to exercise ordinary and reasonable diligence to prevent it; whereby he had his foot caught in an iron stirrup suspended from a flat car, and he was thrown to the ground with his foot hanging in the stirrup, and his right leg was broken in three places, etc. Defendant was entirely to blame for the accident, by stopping up the crossing and failing to provide means for persons to cross the track, by failing to have lights, and by leaving the freight train for so long a time across the public street in violation of the law, and thus forcing those passing to go across its cars; the surroundings rendering it impossible, or at least more dangerous and hazardous, to attempt to surround the blockading train than to attempt a passage by going over the cars." The syllabus by the court (LUMPKIN, J., rendering opinion), is as follows: "Although obstructing the public street by leaving a freight train standing across it for a considerable length of time was an unlawful act on the part of the railway company, the company was not liable in damages to one who, in attempting to climb over a flat car, which formed a part of the train, put his foot in a stirrup attached to the car, and accidentally fell to the ground, and, by reason of his foot hanging in the stirrup, was seriously injured. The unlawful act of the

railway company was not the proximate cause of the injury, but the same was the result of a pure accident, for which the company cannot be held responsible." Judgment affirmed. J. H. MARTIN appeared for plaintiff; DE LACY & BISHOP, for defendant.

PERSON WALKING ON TRACK STRUCK BY PROJECTING TIMBERS FROM CAR — NEGLIGENCE FOR JURY. — In **BASTON v. THE GEORGIA RAILROAD**, 60 Ga. 339 (1878), it was held that "a person who declares that he was upon a railroad track by its consent and was injured by the running of the cars caused by unusual loading of the same — the timbers projecting seven feet beyond the track and he standing that distance from it at night, supposing himself safe at such a distance from the rail — several other trains properly loaded having passed without injury to him — has the right to go to a jury, the question of negligence being one peculiarly for the jury, the presumption in all cases being against the company; and a declaration alleging facts to the effect above stated should not have been dismissed on demurrer." Judgment of dismissal reversed.

BOY WALKING ON RAILROAD TRACK STRUCK BY WOOD CAR FROM WHICH TIMBER PROJECTED — CONTRIBUTORY NEGLIGENCE — DUTY OF RAILROAD COMPANY — CARE REQUIRED FROM TRAVELERS — TRESPASSERS — LICENSEES — SIGNALS — WHEN RAILROAD COMPANY NOT LIABLE. — In **CENTRAL RAILROAD v. BRINSON**, 70 Ga. 207 (1883), action for damages for injuries to a boy who was struck by a train while he was walking on railroad track, the facts were as follows:

"Jefferson Brinson, a minor, represented by his father and next friend, James Brinson, brought his action for damages against the Central Railroad. His declaration alleged that in February, 1877, the Central Railroad being the lessee of the Augusta and Savannah Railroad, and operating it, had so carelessly and negligently loaded and run its engine and cars in the county of Burke, that they ran over and crushed the foot and ankle of plaintiff, causing him to lose the same, and otherwise injuring him. Damages were laid at \$20,000. Defendant pleaded the general issue.

"On the trial, the evidence for the plaintiff showed in brief the following facts:

"Plaintiff was a boy fifteen years of age, living in the town of Lawtonville, Burke county. He attended school on the opposite

side of the town from that where he lived, and about three miles distant from his home. He frequently walked to school, and in doing this he was accustomed to walk along the track of the Augusta and Savannah Railroad, which was leased and operated by the Central Railroad. There was a dirt road running along the defendant's right of way, but it was not suitable for the use of foot passengers, and in winter was muddy and almost impassable. Near the school house there was a culvert under the railroad, which had become partly stopped up, causing a pool of water to collect and rendering the road unsuitable for walking. It was the custom of persons passing through Lawtonville on foot to walk along the railroad track. Not far from the schoolhouse the railroad was elevated above the ordinary level of the ground, and ran along an embankment about six feet in height. On the morning of February 7, 1877, plaintiff, in company with a girl who was attending the same school, was walking along the track towards the schoolhouse. When within about 200 or 300 yards of his destination, and midway between a switch and the point where the wagon road crossed the railroad, being about twenty yards from each, he saw a wood train approaching him. It was about 200 or 300 yards distant. The track was straight for about a mile, and there was nothing to prevent seeing the train. When the train had arrived within from twenty-five to forty yards of plaintiff, he stepped off the track on to the embankment, as did also his companion. At this point the embankment was about four or five feet wide outside of the track. Plaintiff moved some three feet from the track to allow the train to pass. His companion was a little in front of him and slightly further from the track. She was also not so tall as he. The train was composed of four or five box cars and several open flat cars, the box cars being next to the engine, the flat cars following, and the conductor's cab being last. There was nothing to prevent the conductor from seeing the entire train. It was running at a very rapid speed; more rapidly than usual. The rate was estimated at from twenty to thirty miles per hour. The engine and box cars passed plaintiff without injury to him. Plaintiff was watching the passing cars when a flat car near the middle of the train approached him, and he noticed a piece of plank or timber projecting from it. He at once dodged, and endeavored to escape the blow which he saw was imminent, but it was impossible to do so, and the plank struck him on the head, knocking him down, and his right

foot and ankle were crushed. The plank which caused the injury was about nine or ten inches wide, two or two and a half inches thick, and eighteen or twenty feet long. It projected six or eight feet beyond the side of the car. After striking plaintiff, it struck the upright iron switch a short distance beyond him, with such force as to bend it over. This switch was situated from four to six feet from the track, and by the force of the collision between it and the plank, the latter was knocked from the train and stuck in the ground. An indentation was found in the plank, variously estimated to be from three to six feet from the end of it. When the train passed Perkins' Junction, about two and a quarter miles from Lawtonville, before the accident, the plank was seen to be projecting three to five feet from the car, by two or three witnesses. One of the parties who saw it motioned to some one on the train and halloed, but nothing was done in regard to it. No whistle was blown or signal given before the accident occurred. Plaintiff could have left the embankment entirely before the train reached him, but moved to a distance which he considered safe, and where the train, ordinarily loaded, would have passed him without injury. The wagon road which crossed the railroad was one in common use, and had a plank crossing over the railroad track, kept in repair by the railroad, but there was no signboard at such crossing. There was a signal post about 300 yards beyond the point where the accident occurred. By reason of the injury, plaintiff was confined to his bed for a number of weeks; was compelled to have his leg amputated, suffering great pain from it; his health was impaired and he was rendered permanently unfit for any active business which would require walking or standing.

“ The evidence for the defendant was, in brief, as follows:

“ The train in connection with which the accident occurred was a wood train going from Augusta to a point above Millen for wood. It was composed of three box cars next to the engine, twelve empty flat cars, and the cab. It was not the habit of wood trains to stop at Lawtonville unless there were cars to be left there, which was not the case that morning. It was a dark and foggy morning, and the conductor could not see the piece of timber from the cab, it being ten cars distant from him, and the standards being up in the ends of the flat cars. He kept the usual lookout, and observed the usual precautions. The average speed, according to schedule for that train, was from fifteen to

eighteen miles per hour. On account of the darkness of the morning, and foggy state of the weather, the train was running a little slower than usual. There was a light down grade at the point where the accident occurred, extending about three-quarters of a mile. As the train neared the schoolhouse, the engineer saw some children on the track, and opened the cylinder cock for the purpose of letting off steam and scaring them off. He also saw the plaintiff and the young lady with whom he was just above the switch on the track. They stepped from the track, the engine passed them, and the engineer knew nothing of the accident until some time afterwards. When they stepped from the track the girl or young lady was furthest from the train. The plaintiff was very close to the cars, being within a foot or a foot and a half of them. The iron stirrups into which standards are inserted on flat cars, project about five inches from the side of the cars and to or beyond the ends of the crossties. Two or three of the persons on the train noticed that plaintiff was very close to the track, and one of them remarked upon it. The conductor saw plaintiff very close to the cars, saw him fall, did not know the cause of it, but thought that he had been struck by one of the standards. Plaintiff got up almost immediately upon falling, and the conductor did not think that he was injured. The right of way of the railroad is 150 feet in width and belongs to the company. The railroad was built before the village of Lawtonville was in existence. Sometimes freight projects beyond the side of the cars, and sometimes wood projects a foot or two. On one occasion a large wheel was carried over this track which projected two or three feet beyond the edges of the car. On two previous occasions, while walking on the track, plaintiff had delayed in getting off until the train was very close to him, so as to cause complaint from the section master, and on one occasion compelling him to slacken the speed of the train. The conductor saw a man motioning to him at Perkins' station, but as the same person had previously spoken to him about obtaining some cars, he thought the sign had reference to that.

On a previous trial of this case, plaintiff swore that he was looking to the side of the car passing, and happening to turn his head, saw the piece of timber projecting from the open car. The jury found for the plaintiff \$11,500.

"Defendant moved for a new trial on the following grounds:

“ 1. Because the verdict is contrary to the following charge of the court: ‘The plaintiff is bound to make out his own entire case by testimony, so far as regards himself and defendant. If he fails to do so in any particular, he cannot recover.’

“ 2. Because the verdict is contrary to the following charge of the court: ‘If the railroad company, or its employees, were negligent at the time of the accident, yet if that negligence did not cause or contribute to the injury of this plaintiff, he cannot recover on that ground.’

“ 3. Because the verdict is contrary to the following charge of the court: ‘If the engineer failed to blow the whistle or ring the bell, and even thus violate the statute, yet, if Brinson, plaintiff, had all the notice of the approach of the train, by actually seeing it, which he would have had by the whistle or the bell, then he cannot recover on that ground.’

“ 4. Because the verdict of the jury is contrary to the following charge of the court: ‘Even though the officers and agents of the railroad company were guilty of negligence on that occasion, yet if Brinson, by the exercise of ordinary care and diligence, could have avoided the consequences to himself of that negligence, he cannot recover.’

“ 5. Because the verdict is contrary to the following charge of the court: ‘And where the evidence shows that plaintiff failed to use this care and diligence to avoid the consequences to himself, it is not a case of contributory negligence, but plaintiff cannot recover at all.’

“ 6. Because the verdict is contrary to the following charge of the court: ‘A traveler who selects the track of a railroad on which to walk does so at his peril, and is bound to make vigilant use of his senses of sight and hearing to avoid collision, and if he neglects to do so and is injured thereby, he cannot recover, even though the railroad company is chargeable with negligence.’

“ 7. Because the verdict is contrary to the following charge of the court: ‘Even though the train was running at a greater speed than was proper, yet if the plaintiff could have avoided the consequences resulting therefrom by the use of ordinary care and diligence on his part he cannot recover.’

“ 8. Because the verdict is contrary to the following charge of the court: ‘It is not the duty of a railroad company, under the statutes of this State, to blow the whistle when its trains are passing through an incorporated town.’

" 9. Because the verdict is contrary to law, in that it is excessive and not warranted by the law and testimony in this case.

" 10. Because the verdict is contrary to law, evidence, and against the weight of the evidence.

" 11. Because the court committed error in giving the following charge to the jury in writing, at the request of plaintiff's counsel, without qualification thereto: 'A railroad company is bound to use ordinary care in the running of its trains, to prevent them from coming in collision with the person of another, and this it is bound to use, even if that other is, on his side, in some degree negligent; therefore, if damage happen to such other person by collision, which the company by the use of ordinary care might have prevented, the company must make good the damage.' "

The motion was overruled, and defendant excepted.

This case has been tried three times. On the first trial the jury found for the plaintiff \$10,000. A new trial was granted by the Supreme Court (64 Ga. 475). On the second trial the jury found for the plaintiff \$12,500, and on the present trial \$11,500. A. R. LAWTON and J. J. JONES appeared for plaintiff in error; A. M. ROGERS, E. L. BRINSON, GIBSON & BRANDT, and L. E. BLECKLEY, for defendant in error.

The Supreme Court (per HALL, J.), reviewed the case at some length, citing numerous authorities (70 Ga. 217-250), reversed the judgment for plaintiff and granted new trial. In a concurring opinion (Id. 250-255), JACKSON, CH. J., cited several authorities. In the course of his opinion, JACKSON, CH. J., said: "The main question, I think, is ruled in the case of *Baston v. Central R. R. Co.*, 60 Ga. 339. The only possible distinction between that case and this is that there the declaration alleged that the plaintiff was upon the railroad track by its consent, and here no express consent is proved. But in the *Baston* case the declaration does not aver express consent, and inasmuch as all pleading is construed against the pleader, it is clear that the mind of the court was not upon the character of the consent, whether express or implied, but upon assent to the man's being on the road, by agents of the company; for otherwise the omission to aver that the consent was express, and to set it out as such, would have been fatal to the declaration, and the demurrer would have been sustained. Besides, the judgment there is not put on the consent of the company as essential to the ruling; but in the opinion

it is said in conclusion, not that the right of plaintiff turned on the consent of the company that he should be on its road, but the language is: 'Especially must this be his right, when he was on the track by the consent of the defendant,' as much as to say he had a right to go to the jury on the allegations anyway, but the consent of the defendant rendered the right indubitable. True, consent is emphasized because it put the point stronger and more irresistible; but without it the declaration would have been held good."

The authorities cited by HALL, J., will be found appended as notes to the several points set out in the syllabus by the official reporter, which syllabus sufficiently states the case and the points decided by HALL, J., and JACKSON, CH. J., and is as follows:

From opinion of HALL, J.:

"1. Railroads, for the benefits and privileges conferred upon them, owe important duties to the public, which they are strictly enjoined to perform; and to enable them to perform such duties, they are entitled to the unobstructed use of all the means which the law places at their disposal for that purpose (1).

"2. While a railroad company has the right to the exclusive use of its tracks, cuts and embankments, except at crossings, nevertheless, where a mere wanton or malicious act of an employee, acting in the scope of his duty, or such gross negligence as is tantamount to wilfulness, causes an injury to a trespasser upon the track, cuts or embankments of the road, it will be held responsible (2).

"3. If a plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover; but, in other cases, the defendant is not released, although the plaintiff may, in some way, have contributed to the injury sustained. No person shall recover from a railroad company for an injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the damages shall be

1. *Citing* Cauley v. Pitts. Cin. & St. Co., 31 P. F. Smith (Pa.) 366; Railroad L. R'y Co., 95 Pa. St. 398, 10 Am. Co. v. Norton, 12 Harris (Pa.) 465. Neg. Cas. 215 n.; Phila. & Reading R. Co. v. Hummell, 8 Wright (Pa.) 278; 1-17 and note; Ill. Cent. R. R. Co. v. Mulherrin v. Del., Lack. & W. R. R. Godfrey, 71 Ill. 500.

diminished by the jury in proportion to the amount of default attributable to him (1).

“(a). The presumption (except in case of suits brought by employees, Code, § 3036), is against the company; and this rule is also taken from the common law (2).

“4. The plaintiff, a boy over fifteen years of age, with others, had been in the habit of walking along the railroad track in going to and from school, it being a better walk than the dirt road near by. He had been accustomed to remain on the track until the cars came near to him, and a short time before the accident, had twice received the complaints of one of the employees of the road, for waiting too long in getting from the track. He knew about what time the train might be expected. On the day of the accident he and a girl, smaller than himself, were walking on the track; the approaching train could be seen more than a quarter of a mile distant; he remained on the track until it came very near him; he then stepped off on one side upon a pathway running beside the track; his distance from the track was estimated differently, but was small; he could have gone further, the bank being sloping and not high; he stood till a large part of the train had gone by, and was looking at the wheels, when he was struck (as he claimed) by a piece of plank projecting from a flat car, was knocked down and run over. *Held*, that he was bound to be watchful and careful, and the absence thereof makes him chargeable with negligence, which will prevent a recovery. His conduct in this case would, perhaps, not have been short of culpable negligence even in one who was rightfully on the track; and it might and could have been easily avoided.

“(a). Slight circumstances may overbalance the presumption of freedom from negligence which is supposed to exist in favor of the plaintiff, such as his being found in a position of danger unexplained, the free use of intoxicating liquors, careless habits, etc.

“(b). The rule of diligence will vary with the facts in each case, and reasonable diligence is to be determined from the facts and surrounding circumstances (3).

1. *Citing* Macon & W. R. R. Co. v. & W. P. R. R. Co., 64 Ga. 308; Ga. R. R. Davis, 18 Ga. 684; Central R. R. Co. & Banking Co. v. Neely, 56 Ga. 543. v. Davis, 19 Ga. 437; Macon & W. R. 2. *Citing* N. J. Ex. Co. v. Nichols, 33 R. Co. v. Davis, 27 Ga. 113; Yonge v. N. J. L. 439. Kinney, 28 Ga. 111; Macon & W. R. R. 3. *Citing* Macon & W. R. R. Co. v. Co. v. Johnson, 38 Ga. 431; Vickers v. Atl. Davis, 18 Ga. 685.

“(c). The company’s servants may ordinarily presume that a person of full age and capacity, who is walking on the track at some distance before the engine, will leave it in time to save himself from harm; or, if approaching the track, that he will stop, if it becomes dangerous for him to cross it. This presumption may not be justified under some circumstances, as in case of a person intoxicated, asleep, or otherwise off his guard (1).

“(d). A failure to give precautionary signals, when in no manner causing or contributing to the injury, does not impose a liability upon the company. If the traveler knew by other means of the coming train, the omitted warnings cannot be the cause of the collision (2).

“5. One who walks upon the track of a railroad, not at a road crossing, is a trespasser thereon, and while the road would be liable for a wanton or wilful wrong of its agents, acting within the scope of their duty; or for gross negligence or carelessness, evincing reckless disregard of the safety of others, or where they perceive the danger of a party in time, and make no effort to avoid it, still, the company is under no such obligation to a trespasser as to those who are properly and lawfully upon its premises, either for the purpose of transacting legitimate business with it, or in furtherance of rights reserved to them by law.

“(a). It is the duty of every man to conduct himself and to manage his property with ordinary care and diligence, and with no more than that, unless he has increased or diminished his responsibility by assuming some special relation with the person who seeks to enforce it. But if one does a gratuitous act for another with the assent of the latter, his responsibility is reduced to the duty of merely slight care and diligence, and to that extent he is bound; and on the other hand, the party receiving the favor is bound to exercise great care and diligence therein for the benefit of the party conferring it.

“(b). The common law has a peculiar regard for human life, and for this reason exacts a greater degree of care when life is at peril than in relation to any matter of mere property. It requires from all persons, including those who render gratuitous services, at least ordinary care for the safety of life.

1. *Citing Parker v. Wilm. & Weldon R. R. Co.* (N. C.), 8 Am. & Eng. R. R. Cas. 420; *N. J. Ex. Co. v. Nichols*, 33 N. J. L. 439.

2. *Citing Chicago, R. I. & P. R. R. Co. v. Houston*, 95 U. S. 697, 7 Am. Neg. Cas. 345; *Southwestern R. R. Co. v. Johnson*, 60 Ga. 667.

“(c). There is a difference as to the degree of care to be observed by the company’s servants to one who avails himself of a gratuitous privilege, and a wrongdoer (1).

“(d). A person who is neither a lunatic, idiot nor insane, and who has arrived at fourteen years of age, or before that age, if such person knows the distinction between good and evil, is held responsible for crime; under ten years, he is not responsible, and he is equally responsible in cases of tort, provided he has reached those years of discretion and accountability prescribed by the Code for criminal offenses.

“(e). This case differs from *Vickers v. Atl. & W. P. R. R. Co.*, 64 Ga. 306, and *Baston v. Ga. R. R. Co.*, 60 Ga. 339.

“6. The mere fact that people have frequently trespassed upon a railroad track, and that the company may not have resorted to any means to stop the same, will not imply consent to such use of the track; nor will it create any right in the public by such user (2).

“(a) When a railroad, by authority of law, goes into possession of land for the objects of its creation, is not that an appropriation to specified uses? And can it divert this use to purposes wholly inconsistent with those which it is authorized to pursue, and which may imperil the lives of travelers and freighters on its train, without incurring a forfeiture of its privileges? *Quære*.

“(b). A mere naked license or permission to enter or pass over an estate will not create a duty, nor impose an obligation on the part of the owner to provide against the danger of accidents (3).

1. *Citing* Ill. Cent. R. R. Co. v. Godfrey, 71 Ill. 507; Aurora Branch R. R. Co. v. Grimes, 13 Ill. 585. See also *Flanders v. Meath*, 27 Ga. 358; *Sims v. Macon & W. R. R. Co.*, 28 Ga. 93; *Southwestern R. R. v. Hankerson*, 61 Ga. 114; *Ga. R. R. & B. Co. v. Nasby*, 56 Ga. 540; *Vickers v. Atl. & W. P. R. R. Co.*, 64 Ga. 306; *Baston v. Ga. R. R. Co.*, 60 Ga. 339.

2. *Citing* *Irwin v. Dixon*, 9 How. 10.

3. Ill. Cent. R. R. Co. v. Godfrey, 71 Ill. 506; *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 373; *Hickey v. Boston & Lowell R. R. Co.*, 14 Allen, 429, 9 Am. Neg. Cas. 454; *Phila. R. R.*

Co. v. Hummell, 44 Pa. St. 375; *Gillis v. Penn. R. Co.*, 59 Pa. St. 129, 10 Am. Neg. Cas. 61; Ill. Cent. R. R. Co. v. Hetherington, 83 Ill. 510; *Finlayson v. Chicago R. R. Co.*, 1 Dill. 579; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Bancroft v. Boston, etc., R. R. Co.*, 97 Mass. 276, 3 Am. Neg. Cas. 765; *Nicholson v. Erie R. R. Co.*, 41 N. Y. 426; *Sutton v. N. Y. Cent., etc., R. R. Co.*, 66 N. Y. 243; *Matz v. N. Y. Cent., etc., R. R. Co.*, 1 Hun, 417; *Holmes v. Central R. R. Co.*, 37 Ga. 593; *Hughes v. Macfie*, 2 H. & C. 744; *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504; *Central R. R. v. Glass*, 60 Ga. 441.

“7. The verdict was contrary to law and evidence, and a new trial should have been granted on that ground (1).

“8. In charging on the subject of contributory negligence, it was error in the court to charge as follows: ‘A railroad company is bound to use ordinary care in the running of its trains to prevent them coming in collision with the person of another; and this it is bound to use, even if that other is, in some degree, negligent; therefore, if damage happen to such other person by a collision which the company, by the use of ordinary care, might have prevented, the company must make good the damage.’ Such a charge left the jury to infer that they were at liberty to find the entire amount of the damage done to the plaintiff, without making any abatement for the negligence chargeable to him (2).

“9. The attention of the general assembly is called to the growing evil of using railroad tracks and embankments as footways, and their interposition to prevent so perilous a practice is invoked.”

From opinion of JACKSON, CH. J., concurring:

“1. The judgment of reversal is concurred in on the ground of error in charging as to the measure of damages, the expression ‘must make good the damage’ being calculated to mislead the jury and convey the idea that the company must pay full damages, thus withdrawing from the jury the doctrine of contributory negligence as lessening the damages which they might give.

“2. Where a parcel of youths and children are in the habit of passing to and from school on a path within the right of way of a railroad company, and have been for years in that habit within the limits of a village, in the knowledge of the railroad authorities, they are not trespassers to the extent and in the sense that the railroad company is only liable for gross negligence, if any of them be killed or injured. On the contrary, the company is bound to use all ordinary and reasonable care and diligence to avoid injury to them, and to neglect to use such reasonable and ordinary care and diligence would make the company liable. As to passengers, extraordinary care and diligence is required.

1. *Citing* Sav., Fla. & W. R’y Co. v. Brinson case, 64 Ga. 475. The majority of the Georgia cases cited in the case at bar will be found reported or cited in notes with the Georgia cases in this volume.

2. *Citing* previous decision in the this volume.

“(a). Questions of negligence are for the jury. The quantum of diligence required of the railroad by law being for the court, it is for the jury to say whether or not the facts proved make that quantum, subject to a review by the court to see if there was sufficient testimony to support the verdict.

“(b). If a railroad train swept through a village without ringing its bell or slackening its speed, with a scantling projecting unusually from its car beyond the track, though within its right of way, and thereby a youth was hurt in its rapid transit, the company is liable, unless by the use of ordinary care he could have avoided the consequences to himself of such transit, or the injury was caused by his negligence alone. If both himself and the agents of the company were at fault, but neither the sole cause of the injury, and if he could not by ordinary care have avoided the consequences to himself, then the damages should be proportioned according to the default of each. The jury pass upon the facts, having in view the age of the plaintiff, previous warnings, if any, and all the surrounding circumstances.

“3. The main question in this case is ruled in *Baston v. Central R. R.*, 60 Ga. 339. See also *Holmes v. Central R. R.*, 37 Ga. 593; *Central R. R. v. Glass*, 60 Ga. 441; Code, §§ 2061, 2063, 217.”

Judgment for plaintiff reversed.

CHILD WALKING ON RAILROAD TRACK WITH RELATIVE KILLED BY TRAIN — RAILROAD COMPANY NOT LIABLE — IMPUTED NEGLIGENCE — DUTY OF RAILROAD COMPANY TO PERSONS WALKING ON TRACK. — In *ATLANTA & CHARLOTTE AIR-LINE RAILWAY CO. v. GRAVITT*, 93 Ga. 369 (1893), action for damages for alleged negligent killing of child who was struck by defendant's train while walking on railroad trestle in company with a relative, judgment for plaintiff was reversed. LUMPKIN, J., reviewed the case at length, discussing and citing numerous authorities on the points at issue, the question of imputed negligence being exhaustively treated by the learned judge. Points 4, 5 and 6 of the syllabus of the case are as follows:

“4. Relatively to a person who, without license from the company, is walking upon a railway track on a trestle, though such trestle be situated between a blow-post and a public crossing, the omission of the engineer to comply with the statutory requirements as to giving signals and checking the speed of the train is not negligence, inasmuch as these requirements raise no duty as between

the company and strangers who may be upon the track elsewhere than at a public crossing.

“5. The duty to observe all ordinary and reasonable care and diligence towards such persons arises when his presence becomes known to the engineer, and not before. A failure in such care and diligence after that time, from which injury results, unless it could have been avoided by the use of ordinary care on the part of the person hurt or killed, will render the company liable.

“6. Although omission of the statutory requirements, when a part of the *res gestæ*, may be considered by the jury in passing upon the question of negligence relatively to the person injured or killed, yet, where the evidence as a whole shows there was no negligence imputable to the company or its servants except failure to observe these requirements, the company is not liable for results occurring upon the track of its road elsewhere than at a public crossing.” Judgment reversed, the evidence not showing negligence on the part of the railroad company entitling plaintiff to recover. LUMPKIN, J., reviewed numerous Georgia authorities relating to collision and crossing cases.

PERSON KILLED BY TRAIN WHILE WALKING ON TRACK — TRESPASSER — PUBLIC USE OF TRACK — EVIDENCE — ORDINANCE AS TO FLAGMEN AT CROSSINGS—EVIDENCE — WILFUL NEGLIGENCE — INSTRUCTION — DAMAGES — VERDICT. — In *WESTERN AND ATLANTIC RAILROAD v. MEIGS*, 74 Ga 857 (1885), an action to recover for the homicide of plaintiff's husband, who was killed by one of defendant's trains while walking on its track at a place where the public had been in the habit of walking, judgment for plaintiff for \$4,000 was affirmed, LUMPKIN, J., reviewing the case and points at length in his opinion. The syllabus by the court (which sufficiently states the facts and the points decided) is as follows:

“1. On the trial of a case brought by a widow against a railroad company to recover damages for the homicide of her husband, testimony to prove that the public had been constantly in the habit of walking on the tracks of defendant's road, at and near the place where the killing occurred, though it was neither a crossing nor such place as the public had a right to be, was properly admitted.

“2. Where one is killed by a locomotive in an incorporated city, ordinances of that city, requiring railroad companies to keep flagmen at certain street crossings and regulating the rate of speed at which trains shall pass such crossings, were properly admitted in testimony, when, in connection with other testimony, they bore on the question of the company's negligence at the place of the killing.

" 3. A request to charge that a railroad company was not liable for an injury to a trespasser upon its track, caused by an engine, unless it was shown that the acts of the company's servants in charge of the engine were wanton and malicious, or there was such gross negligence on their part as was tantamount to wilfulness, was rightly refused. In such cases the said servants are required to use a degree of care which amounts to more than the mere absence of wantonness, malice or reckless disregard of another's safety.

" 4. The act, approved August 27th, 1879, entitled 'An act to alter and amend section 2970 of the Code,' repealed that entire section.

" 5. The amount of damages to which a widow is entitled from a railroad company for the homicide of her husband should not be reduced by an insurance on his life received by her.

" 6. It is not error for the court to instruct the jury upon the doctrine of contributory negligence and apportionment of damages in a case where the jury would be authorized, under the testimony, to find that both parties were at fault in occasioning the injury for which the action was brought.

" 7 After explaining to the jury the issues made by the pleadings, it is not error for the court to say the pleadings are not evidence, and what is stated in them is not to be considered by the jury as evidence. On the other hand, this is an entirely proper instruction.

" 8. On the trial of an action for damages it is not error for the court to state to the jury that he uses the word 'negligence' in the sense of 'carelessness' in his charge to them, especially when the charge contains full and accurate explanations of all the legal degrees of diligence and negligence.

" 9. Whether or not a verdict is contrary to a specified charge of the court depends upon the testimony applicable to the question to which the charge relates; and if that testimony is conflicting, and the jury believe the witnesses of one party, it does not follow that, at the instance of the other party, the verdict should be set aside as contrary to such charge.

" 10. This court will not review the verdict of a jury, or pass on the question whether it was or was not contrary to the evidence, when there was no motion for a new trial in the court below." Judgment affirmed. JULIUS L. BROWN appeared for plaintiff in error; HOPKINS & GLENN, for defendant in error.

BROYLES, RECEIVER, V. PRISOCK.

Supreme Court, Georgia, October Term, 1895.

[Reported in 97 Ga. 643.]

PERSON STRUCK BY TRAIN WHILE CROSSING TRACK AT STREET CROSSING — DAMAGES — EVIDENCE — DISCRETION OF COURT — *RES GESTÆ* — DEGREE OF CARE REQUIRED OF TRAVELER — INSTRUCTION — VERDICT. — 1. It was competent for the plaintiff in an action for damages resulting from personal injuries to testify that when injured he was earning a stated monthly salary as assistant jailer, it appearing that because of his injuries he was deprived of this situation and his salary in connection therewith for three months. The evidence was admissible not only to show the actual loss of salary for that period, as a basis for computing in part his damages, but also to throw light generally upon his capacity to earn money.

2. What instructions should be given to witnesses by the trial judge upon their separation during a suspension of the trial, is a matter for his discretion which this court will not control unless plainly and palpably abused, which was not done in the present case.
3. Even if it be within the discretion of the trial judge, over objection by either party, to allow the jury in the trial of an action for damages to inspect the place where an alleged injury occurred, this court will not reverse his action in refusing so to do, when it affirmatively appears that material physical changes had occurred in the character of the premises between the time of the injury and the time of the trial.
4. Exclamations or complaints made by a person undergoing physical examination by a physician with a view to ascertaining the extent of his alleged injuries, and apparently made in response to manipulations of the person's body or members by the physician, are admissible in evidence, though such person was not under the treatment of this particular physician and the examination was being made solely for the purpose indicated. Whether or not the exclamations were involuntary, or the complaints were *bona fide*, is for determination by the jury under all the evidence submitted.
5. The reasonableness or unreasonableness of a city ordinance with reference to its application to a particular locality not being involved in the case, and there being no request to charge on this subject, an omission to do so was not error.
6. The standard of ordinary care and diligence by which the conduct of a particular person under given circumstances is to be judged, is one which the jury must derive from their observation, their common sense, and their common knowledge and experience. The charge in this case was in accord with this rule.
7. There was no error in admitting evidence nor in refusing to charge as requested, nor in the charges complained of. The evidence warranted the verdict, and there was no abuse of discretion in denying a new trial.
(Syllabus by the Court.)

APPEAL from judgment for plaintiff in the Fulton Superior Court. The facts appear in the opinion. *Judgment affirmed.*

N. J. & T. A. HAMMOND, for plaintiff in error.

R. B. BLACKBURN, for defendant in error.

Simmons, Ch. J. — Prisock sued the receiver of the Metropolitan Street Railroad Company for damages which he alleged were sustained by him in consequence of his having been struck and run upon by an engine and cars operated by the defendant, while he was in the act of crossing the railroad track at the intersection of Hunter street and Frazier street in the city of Atlanta. He obtained a verdict for \$800, and the defendant made a motion for a new trial, which was overruled, and the defendant excepted.

1. It is complained in the motion for a new trial that the court erred in allowing the plaintiff to testify that at the time of his injury he was making a monthly salary of \$50 as assistant jailer of Fulton county jail, over objection that this did not show or tend to show how much he could earn by his labor. The court did not err in admitting this testimony. It appeared that, because of the injuries complained of, the plaintiff was deprived of the situation referred to, and his salary in connection therewith, for three months; and the evidence was admissible not only to show the actual loss of salary for that period, as a basis for computing in part his damages, but also to throw light generally upon his capacity to earn money.

2. When the trial began, the witnesses were sworn and put under the rule, those not examined being required to remain out of the hearing of the witness testifying. When the court was about to adjourn on Friday to Monday, defendant's counsel requested the court to instruct all the witnesses not to talk among themselves or to any one in reference to the case during the adjournment. Plaintiff's counsel objected. The court had all the witnesses called in, and instructed them not to allow any witness who had testified to communicate anything to them that had been testified to on the stand, and specially instructed the plaintiff not to say anything to the witnesses in reference to what he had testified. No witness but the plaintiff had been examined, and his examination had not been concluded. It is alleged that the court erred in instructing the witnesses as requested, and in restricting the instructions within the limits mentioned. What instructions should be given to witnesses under such circumstances is a matter within the discretion of the trial judge; and this court will not control his discretion in such a case unless plainly and palpably abused, and this was not done in the present case.

3. The plaintiff's testimony having been concluded, counsel for the defendant moved that the jury be permitted to go to the place where the injury occurred and view the premises. It appeared from the evidence that since the time of the injury, material physical changes had occurred in the character of the premises; and upon this ground plaintiff's counsel objected to the granting of the request. It was further objected that there was no power in the court to grant such a request over the protest of the opposite party. The court stated that for the present he would overrule the motion; but that if counsel could find authority in point thereafter and show it to the court, he would reverse his ruling. The defendant complains that this was error, and that the examination ought to have been allowed before defendant's testimony was opened.

There is some conflict of authority as to whether, in the absence of a statute authorizing a view of the premises by the jury, it is competent for the court to order a view against the objection of a party. See 1 Thompson on Trials, § 882; *Springer v. City of Chicago*, 35 Am. & Eng. Corp. Cas. 183. In the case of *the Mayor and Aldermen of Milledgeville v. Brown*, 87 Ga. 599, it appeared that the jury were permitted to visit the scene of the injury and make a personal examination of the premises, and Justice Lumpkin, in referring to this as showing that the jury had a good opportunity for arriving at a correct conclusion as to whether the city authorities were negligent or not, remarked incidentally that it was a good practice; but in that case counsel on both sides consented to the view of the premises by the jury, and no question was made as to the power or duty of the court in such cases. Assuming, however, that it is within the power of the trial judge to allow the jury to inspect the premises, over objection by either party, this court will not reverse his action in refusing to do so, when it affirmatively appears, as it did here, that there have been material changes in the premises between the time of the injury and the time of the trial.

4. A physical examination of the plaintiff for the purpose of ascertaining the extent of his injuries was made by Dr. Hurt, a physician employed by the defendant. At the trial a physician who assisted in the examination was introduced as a witness, and was asked by counsel for the plaintiff: "What, if any, complaint did Mr. Prisock make at the time that Dr. Hurt examined him?" Counsel for the defendant objected to the complaints of the

plaintiff, because Dr. Hurt was not then treating him. The court replied that it was admissible to show whether when the arm was moved he did complain. The witness was then asked: "At the time that Dr. Hurt was moving the arm of Mr. Prisock backwards and forwards, or trying to do so, trying to straighten it, what complaint did Mr. Prisock make at that time relative to the movement that Dr. Hurt was trying to give in the operation, as to pain and suffering?" The witness answered: "On pressure, he complained of pain in the operation of the supposed fracture in the upper part of the arm. We can't say whether it was fractured or not. There seems to be remnants of *callus* at present. He complained that there was great pain there, on pressure, and also, in raising the arm up over the shoulder, that there was pain in the same region." Counsel asked: "What evidence of suffering did he show when Dr. Hurt examined him in the side?" The witness answered: "He said it pained him when he pressed on the side." Counsel for the defendant contended that such complaints were not admissible, and that the court erred in allowing this testimony.

We think the court was right in overruling the objection to this testimony. Complaints of pain which are made apparently in response to manipulation of the person do not come within the rule which excludes hearsay and self-serving declarations, and it is not necessary, in order to render them admissible, that they should be made to a physician for the purpose of treatment. Such complaints are regarded as manifestations of pain, as a part of the *res gestæ* of the pain, and are not classed with mere descriptive statements. They are received as original evidence, and may be testified to by any person in whose presence they are uttered. In the case of *Atlanta Street R. R. Co. v. Walker*, 93 Ga. 462, which was relied upon by counsel for the plaintiff in error, it did not appear that the complaints were of this character. In the opinion of the court, Bleckley, Ch. J., refers to the case of *Roche v. Brooklyn, etc., R. Co.*, 105 N. Y. 294, the reasoning of which, he says, is "entirely satisfactory," and in that case it was said that although declarations of the party injured made some time after the injury, simply to the effect that he is suffering pain, when not made to a physician for the purpose of professional attendance, are not competent, the rule is different as to involuntary and natural exhibitions of pain, such as exclamations indicative of pain when the person is touched, etc. See

also *Hagenlocher v. R. R. Co.*, 99 N. Y. 136, where such evidence was held admissible. Numerous other authorities could be cited to the same effect. Such expressions of pain, it is true, may be simulated, and when made after the party has instituted suit on account of the alleged injury, may well be distrusted; but this goes to the weight of the evidence and not to its competency. Whether or not the exclamations were involuntary or the complaints were *bona fide*, is for determination by the jury under all the evidence submitted. See on this subject an instructive article entitled "Declarations of Pain and Suffering," 22 Central Law Journal, p. 509, in which numerous cases are cited and discussed.

5. Certain ordinances of the city of Atlanta touching speed of cars, ringing of bells, etc., were in evidence; and the court charged the jury, in substance, that if the defendant's servants in charge of the engine and car violated these ordinances and ran over the street crossing at a speed greater than that allowed by the ordinances, this would be negligence. The defendant contends that this was error, because it took from the jury the consideration of the reasonableness or unreasonableness of the ordinances, or either of them. It appears from the certificate of the judge that no charge on this question was requested on the part of the defendant, and no such question was raised on the trial. Besides, it appears from the evidence that the place where the injury occurred was near the center of the city, and in a populous locality; and there could be no question of the reasonableness of the ordinances as applied to that locality. See *Metropolitan Street R. R. Co. v. Johnson*, 90 Ga. 506, 507.

6. The court, in charging the jury as to the degree of care required of a person when about to cross the track of a railroad, said: "The precise thing that every man is bound to do before stepping upon a railroad track, is that which every prudent man would do under like circumstances. If you believe from the evidence that every prudent man would look and listen, so must every one else, or take the consequences, so far as the consequences might have been avoided by that means," etc. It was contended that the instruction that if the jury believed "from the evidence" every prudent man would look and listen, so must every one else, etc., was erroneous, as the jury are supposed to know what prudent men would do under such circumstances, and are not required to ascertain it from the evidence. It is true, the question of what prudent men would do under given circumstances

is to be determined by the jury from their own observation, their common sense and their common knowledge and experience; but we do not think the charge of the court was calculated to mislead the jury on this point. What the court doubtless meant, and was doubtless understood by the jury to mean, was that if they believed that under the circumstances shown by the evidence prudent men would look and listen, so must every one else, etc. In addition to the language above quoted, the court charged at considerable length on this subject, and we do not think there could have been any room for the jury to infer that they were precluded from relying upon their general knowledge and experience in arriving at a conclusion as to what would have been the conduct of prudent men under the circumstances in evidence.

7. Several of the remaining grounds of the motion for a new trial were not insisted upon, and others are so clearly without merit that it would be unprofitable to deal with them specifically. The requests to charge, so far as they were proper, were covered by the charge given. There was no error in admitting evidence. The evidence warranted the verdict, and there was no abuse of discretion in denying a new trial.

Judgment affirmed.

CENTRAL RAILROAD & BANKING COMPANY v. ROBERTSON.

Supreme Court, Georgia, October Term, 1894.

[Reported in 95 Ga. 430.]

BRIDGE OVER PRIVATE CROSSING — DEFECTIVE CROSSING — COLLISION OF TRAIN WITH MULES AND WAGON — RAILROAD LIABLE. — 1. Where a railroad company builds and undertakes to keep in repair for the accommodation of the public a bridge over or approach to a private crossing, this is such an invitation to the public to use the same as would render the company liable for injuries resulting from defects negligently permitted to exist or remain in the bridge or approach, even though it be not affirmatively shown that such crossing is one which the company is bound by statute to keep in safe order and condition. This case is distinguishable from *Cox v. East Tenn. V. & G. R. R. Co.*, 68 Ga. 446 (1).

1. In *COX v. EAST TENNESSEE, VIRGINIA & GEORGIA R. R.*, 68 Ga. 446 (1882), the facts were as follows: Cox sued the East Tennessee, Virginia & Georgia R. R. for \$500 damages for injuries sustained by his wife by reason of her falling out of a wagon in crossing the defendant's track. The case was originally brought in the Superior Court of Whitfield county, was removed

2. While the charge of the court as to "checking the train" may not have been entirely appropriate, yet, as the case really turned upon the question whether or not the defendant had negligently permitted the crossing to become and remain unsafe for want of repairs, and the plaintiff's evidence affirmatively showed the existence of such negligence, and that the injury complained of resulted therefrom, while the evidence introduced for the defendant was merely negative as to these matters, the charge in question was harmless, and affords no cause for a new trial (1).

(Syllabus by the Court.)

APPEAL from judgment for plaintiff in the Houston Superior Court. The facts appear in the opinion. *Judgment affirmed.*

by the defendant to the United States Circuit Court, and that court granted a nonsuit. Within less than six months plaintiff again brought his action, on the same grounds, in the Superior Court of Whitfield county. Plaintiff alleged in his declaration, and attempted to show, that the crossing at which the injury occurred was a private crossing on his farm, but had been kept in repair by defendant for a number of years, and had been used by plaintiff all during that time to go from one part of his farm to the other; that after so keeping the crossing in repair, defendant had neglected to fix the same, and that the accident to his wife resulted from the dilapidated condition of the crossing. The cause of action arose in 1874, the present suit was brought in 1880. To avoid the bar of the statute of limitations plaintiff proved that he had commenced his suit for the same cause of action in January, 1876; that it had been removed to the Circuit Court of the United States and on the trial there a nonsuit had been granted within less than six months before the commencement of this case. Plaintiff here closed his case, and on motion of defendant's counsel the court granted a nonsuit, to which the plaintiff excepted. It was held by the Supreme Court (as per syllabus by the court), as follows, namely, that "when a case has been removed from a State court to the Circuit Court of the United States, the

jurisdiction of the former ceases, and after nonsuit in the Federal court, the case cannot be renewed in the State court within six months, so as to avoid the statute of limitations. Section 2932 of the Code does not apply to such a case." *Held*, also, that "railroad companies are required to keep in proper repair public roads or private ways established by law where they cross the railroad, and to build suitable bridges or make proper excavations or embankments. But they are not required to build bridges for crossings which are neither public nor private ways established by law; nor are they responsible for damages resulting from the construction of a bridge narrower than the road at such a crossing." Judgment of nonsuit affirmed. Opinion by JACKSON, CH. J.

1. In *GEORGIA RAILROAD & BANKING Co. v. MAYO*, 92 Ga. 223 (1893), it was held (per syllabus by the court), that "by statute it is the duty of railroad companies to construct and maintain on the line of highways safe crossings over their tracks, and where a bridge over the track reasonably required a railing to project from the bridge a short distance along the margin of the highway, in order to render the crossing safe, and a traveler, whose mule took fright while being driven across the bridge, was precipitated from the highway, and injured, in consequence of the absence of such railing, the company is liable in damages."

STEED & WIMBERLEY and JOHN R. COOPER, for plaintiff in error.

M. G. BAYNE, for defendant in error.

Simmons, Oh. J.—Robertson sued the railroad company for damages which he alleged had been sustained by him from the running of its train of cars against his mules and wagon while they were stalled upon the track at a crossing kept up by the defendant, because a cross-tie placed in the crossing by the defendant was rotten and broken, etc. There was a verdict for the plaintiff for \$75, and, the defendant's motion for a new trial being overruled, it excepted.

It was contended on the part of the railroad company that the crossing at which the injury occurred, not being a public road or a private way established pursuant to law, the company was under no duty to keep it in repair, the only statutory requirement as to the keeping in repair of crossings by railroad companies being that contained in section 706 of the Code, which provides that "all railroad companies shall keep in good order, at their expense, the public roads or ways established by law, where crossed by their several roads, and build suitable bridges and make proper excavations or embankments according to the spirit of the road laws." It appears from the evidence that the bridge or crossing at which the injury occurred was built and kept up by the railroad company, and according to the testimony of the defendant's "supervisor," who was the officer charged with the duty of looking after repairs of the track and crossings upon its line of road, "the crossing was put there to accommodate the settlement." In view of these facts it does not matter whether the crossing was one which the defendant was required by statute to keep in repair or not. Where a railroad company builds a crossing over its road, and undertakes to keep it in repair for the accommodation of the public, this is equivalent to an invitation to the public to use the same; and if a person using the crossing sustains injury from defects negligently permitted to exist or remain in the crossing, the company will be liable in damages, independently of any statutory provision on the subject. The principle which governs in such cases has been stated thus: 'When the owner or occupier of land, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by the unsafe condition of the land or its

approaches, and under such an express or implied invitation he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." *Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145. "The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers; and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by any owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." *Sweeny v. Old Colony & Newport R. R. Co.*, 10 Allen, 373. The rule here laid down has been applied in numerous cases against railroad companies, similar to the case now under consideration. See, among others, the following: *Stewart v. Penn. R. R. Co. (Ind.)*, 14 Am. & Eng. R. R. Cas. 679, and cases cited in note; *Murphy v. Boston & Albany R. R. Co.*, 133 Mass. 131; *Missouri Pacific R. R. Co. v. Bridges (Tex.)*, 39 Am. & Eng. R. R. Cas. 604, and note; *Retan v. Lake Shore & Michigan Southern R. Co. (Mich.)*, 55 Am. & Eng. R. R. Cas. 97, 100. As was said by the court in *Stewart v. Penn. R. R. Co.*, *supra*, "it would be no answer for the defendant to say 'I was not bound to make the crossing in the first instance, nor was I bound, after having made it, forever after to keep it in repair; I could abandon it at any time.' For all this might be true, and yet so long as the defendant was continuing to hold out to the public an invitation to cross, it was virtually saying, 'this crossing is safe;' and it was its duty to use due care to make its representations good."

The present case is distinguishable from that of *Cox v. Railroad Co.*, 68 Ga. 446 (1). That case was controlled by the statute of limitations, the court holding that the action was barred

1. See abstract of the *Cox* case, on page 338, *ante*.

by the statute; and upon its merits it differs essentially from this case. Although the declaration in that case alleged that the crossing was in a dilapidated condition, and that the injury resulted from such condition, the proof failed to show dilapidation, and the only defect shown was that the bridge was narrower than the road at the crossing, which fact was well known to the plaintiff, for the railroad at that point passed through his own farm, and he had been using the bridge daily for months, sometimes as much as twenty times a day. The court held that the railroad company was not required by the statute to build and maintain a bridge, and was not liable for damages because it had constructed a bridge narrower than the law required.

2. While the charge of the court to "checking the train" may not have been entirely appropriate, yet, as the case really turned upon the question whether or not the defendant had negligently permitted the crossing to become and remain unsafe for want of repairs, and the plaintiff's evidence affirmatively showed the existence of such negligence, and that the injury complained of resulted therefrom, while the evidence introduced by the defendant was merely negative as to these matters, the charge in question was harmless and affords no cause for a new trial.

Judgment affirmed.

WAGON STRUCK BY TRAIN AT STREET CROSSING — FAILURE TO RING BELL — RAILROAD COMPANY LIABLE. — In *ATLANTA AND WEST POINT RAILROAD v. WYLY*, 65 Ga. 120 (1880), collision between wagon and train at street crossing, it was held that "while negligence, as a general rule, is a question for the jury, yet where the statute makes a certain act, having a material bearing on the case, imperative upon the agents of a railroad company, the court may instruct the jury that proper diligence required such act. Thus, in a suit for damages to a dray by a train, at a street crossing in a city, the negligence of defendant's agents being in question, there was no error in charging that proper diligence required the tolling of the locomotive bell in approaching a crossing." *Held*, also, that "in a suit against a railroad company for injury to personal property in charge of plaintiff's agent, the rule of damages is this: If the injury occurred wholly by the agent's fault, there could be no recovery; if by the mixed fault of the agent and the company, there could be a recovery, but diminished in proportion to the agent's fault; if wholly by the fault or negligence of the company's agents, then there could be a recovery of full

damages. Taken as a whole, this seems to be the effect of the judge's charge." Judgment for plaintiff for \$227.50 affirmed.

ATLANTA CONSOLIDATED STREET RAILWAY COMPANY V. BEAUCHAMP.

Supreme Court, Georgia, October Term, 1893.

[Reported in 93 Ga. 6.]

COLLISION BETWEEN ELECTRIC CAR AND VEHICLE — DAMAGES — EVIDENCE — MORTALITY TABLES — HORSE FRIGHTENED — EVIDENCE — RATE OF SPEED OF CAR — INSTRUCTION. — 1.

The declaration alleging that the plaintiff's injuries had destroyed his ability to work and pursue his accustomed avocation; that his business was that of a granite and stone contractor, requiring him to be on his feet, and to exert all his physical powers in superintending, directing, helping, etc.; and that his average earnings were \$150 per month, all of which were lost for all the future, — there was no error in allowing him to testify as a witness what work he did individually before the injury, and that its value was \$5 per day, the evidence showing that the work he did individually was done in pursuing his calling as a granite and stone contractor.

2. The plaintiff having testified that there was nothing to hinder the motorman from seeing him, and that there was nothing between the motorman and the witness and his cart, there was no error in allowing him to state he thought or supposed the motorman would stop the car; this testimony illustrating and explaining the conduct of the plaintiff in managing his horse upon the occasion under investigation.
3. A witness, being asked whether or not if a certain thing, mentioned in the question, had been done she would have seen it, answered, "Well, I suppose I would." The question was not leading, nor the answer illegal.
4. Before the Carlisle mortality and annuity tables can be properly admitted in evidence, to show the expectancy of the plaintiff and aid the jury in arriving at the amount of damages he should recover for a permanent injury, the foundation should be laid by proving the plaintiff's age, or introducing evidence from which his age could be inferred or approximately arrived at by the jury.
5. When it is open to question at what a horse became frightened, the witness, after stating the facts, may testify he was pretty certain the animal took fright at a particular object.
6. Upon an assignment of error alleging that "the court erred in charging the jury as follows: 'If you believe from the evidence that the motorman in charge of the car was running at a high rate of speed,' then certain legal consequences followed as therein declared," — without setting forth what those consequences were, as expressed in the charge, it is impossible for this court to determine whether, if erroneous at all, the charge excepted to resulted in any injury to the party complaining of it.
7. The plaintiff's cause of action being based upon the theory that, before the injuries therein complained of, he was in all respects a perfectly sound and

healthy man, there being nothing either in the declaration or the evidence introduced by him to suggest the contrary, and the newly-discovered evidence disclosing that he had previously been severely afflicted with rheumatism, and had also received a gunshot wound, which permanently disabled his right arm, and the newly discovered evidence further tending to show that the injuries inflicted by the defendant were not so serious as the plaintiff had testified, the ends of justice would require a new trial. It is probable, if not certain, that, in allowing the amount of damages found by the verdict, the jury acted under the belief that the plaintiff, when he received the injuries for which this action was brought, was a sound and healthy man, and, consequently, awarded a larger amount than they would have done had the facts disclosed by the newly discovered evidence been before them. Under all the circumstances, the plaintiff could not, consistently with good faith, withhold and conceal these facts from the jury. As to a material part of the newly discovered evidence, there was no want of diligence in failing to acquire knowledge of it before the trial.

(Syllabus by the Court.)

APPEAL from judgment for plaintiff in the City Court of Atlanta. The facts appear in the opinion. *Judgment reversed.*

N. J. and T. A. HAMMOND, for plaintiff in error.

ARNOLD & ARNOLD, for defendant in error.

Lumpkin, J. — 1. The plaintiff brought an action against the railway company for damages resulting from a collision between an electric car of the defendant and a vehicle he was driving. After setting forth the injuries received by the plaintiff, and the manner of their infliction, the declaration alleged as follows: "All the foregoing injuries he charges to be permanent, and will forever destroy his ability to work and pursue his accustomed avocation. His business is that of granite and stone contractor and builder, and said occupation requires plaintiff to be on his feet, and requires him to exert all his physical powers in superintending, directing, helping, etc. His average earnings were \$150 per month, all of which are lost for all the future." Over objection of the defendant, the plaintiff, while on the stand as a witness, was permitted to testify that he was a contractor, doing building work generally, working from fifteen to twenty hands, of about half of whom he had charge, and his partner had charge of about half; that he (witness) did actual work, very often turning over stone, taking hold of anything he could; that he had to superintend the work nearly all the while; that he laid off the work for the men, and they did the drilling, and, after the drilling was done, he took a large hammer and broke up the stone; and that doing what he did was worth \$5 a day. The objection

to this evidence was that the suit was brought for what the plaintiff lost as contractor, and that there was no allegation in the declaration as to the value of his individual services per day, or for any other length of time. We think the evidence was properly admitted. It tended to support the allegations of the declaration, and it seems quite clear that the work about which the plaintiff testified was done in pursuance of his calling as a granite and stone contractor.

2. In view of the fact that the electric car was approaching the plaintiff while he was upon the track with his horse and vehicle, what he did under these circumstances in managing his horse was a material matter for investigation. Having testified that there was nothing to prevent the motorman of the car from seeing him, and that there was nothing between himself and his cart and the motorman to obstruct the latter's view, there was no error in allowing the witness to add that he thought, or supposed, the motorman would stop the car. This testimony certainly threw some light upon, and tended to illustrate and explain, the conduct of the plaintiff on this occasion.

3. During the examination of a female witness, introduced in behalf of the plaintiff, she was asked: "State whether or not, if the motorman had turned off the electricity, or wound the brake, you would have seen it." She answered: "Well, I suppose I would." The question was objected to on the ground that it was leading, and the answer, upon the ground that it was illegal. We do not think there is any merit in either of these objections. Counsel had a right to interrogate the witness concerning her opportunity to observe the conduct of the motorman on the occasion in question. Her answer merely states, in effect, that her position was favorable to noting any action on the part of the motorman in the respect inquired about.

4. It can hardly be doubted that, before the Carlisle mortality and annuity tables can be properly admitted in evidence in a case of this kind, the foundation for so doing should be laid by proving the plaintiff's age, or at least introducing some evidence from which his age can be inferred or approximately arrived at by the jury. The trial judge recognized the correctness of the rule thus announced, and, it seems, admitted these tables upon the idea that defendant conceded that the plaintiff's age was as alleged in the declaration. Be this as it may, no trouble on this score can arise upon the next trial. So this assignment of error need not be further discussed.

5. There was no error in allowing the plaintiff to testify he was "pretty certain" his horse became scared at a piece of terra cotta pipe lying upon the edge of the street; it being a question whether the horse was actually frightened by this, or some other, object.

6. The error assigned to the charge of the court set forth in the sixth headnote was, that the expression "high rate of speed" was susceptible of the construction "illegal rate of speed," of which there was no evidence; or, if not susceptible of that construction, it left the jury to form in their own minds an idea of what was a high and what a low rate of speed, and was therefore misleading and calculated to injure the defendant. The ground of the motion for a new trial complaining of the charge referred to is manifestly incomplete. It does not set out enough of the charge to enable this court to determine whether or not the words pointed out as objectionable were in fact erroneous, or injurious to the defendant, in the connection in which they were used. Certainly the ground ought to have disclosed what "legal consequences" the trial judge said would follow in case the jury should believe that the motorman was running his car at a "high rate of speed," in order to enable us to fully understand the nature and effect of the charge complained of. Considering merely the extract from the charge given, we are unable to say there was error.

7. Nothing whatever in the plaintiff's declaration, nor in the evidence introduced by him in support of it, in the remotest manner states or suggests that he was not, prior to the injuries alleged to have been inflicted upon him by the defendant, in all respects a sound, vigorous and healthy man. Indeed, it would have required extraordinary astuteness and vigilance to even suspect the contrary, and there is no reason to doubt that the jury tried and disposed of the case upon the theory that the plaintiff had never been seriously injured or physically affected before he received the injuries complained of in this action. The newly discovered evidence, if true, shows clearly that he had, before this time, been severely afflicted with rheumatism, and had also received a gunshot wound which permanently disabled his right arm. It also tends to show that the injuries the plaintiff received at the hands of the defendant were by no means so serious as the plaintiff at the trial testified. We therefore feel constrained to order a new trial. It is certainly probable, if not absolutely

certain, that in estimating the amount of damages to be awarded, the jury compared the physical condition of the plaintiff at the trial with that of a man in good health, with sound and vigorous limbs, unimpaired by disease or injuries of any kind, under the belief that plaintiff was such a man before he received the injuries sued for. Acting upon this belief, they doubtless allowed him a larger amount than they would have done had the facts brought to light by the newly discovered evidence been before them. Good faith and fair dealing forbade the plaintiff from withholding and concealing these facts from the jury. Under the circumstances stated, common honesty required a disclosure of the facts for their consideration. He had no right to pose before them as a man who, formerly having a strong constitution, perfect health and sound limbs, had been by the defendant made a physical wreck, and thus obtained a recovery of an amount much larger than he was really entitled to receive. We do not by any means intimate that every plaintiff is, at all times and under all circumstances, under obligation to disclose facts which would injure his case; but in the case before us, the conduct of the plaintiff amounted to a tacit assertion, equivalent almost to actual swearing, that he was a sound man until injured by the defendant. He was sworn as a witness in his own behalf, and his oath required him to tell "the truth, *the whole truth*, and nothing but the truth." We do not think he complied with its terms. His deliberate suppression of most material facts, if not altogether as bad as actual falsehood, certainly was hardly less injurious to the defendant than if he had made false statements as to his previous physical condition.

Some of the facts which appear from the newly discovered evidence might, by the exercise of proper diligence, have been discovered before the trial; but there was no want of diligence on the part of defendant or its counsel in failing to sooner ascertain many of the material facts to which reference has been made above.

We have ruled upon and discussed all the grounds of the motion for a new trial, except such as relate to certain questions which cannot arise upon the next hearing. We are satisfied that the ends of justice require a new trial in this case, and have accordingly so ordered.

Judgment reversed.

BACKING TRAIN OF STREET CARS — COLLISION WITH WAGON ON TRACK—ACCIDENT—RAILROAD NOT LIABLE. — In **ROME STREET RAILROAD CO. v. MCGINNIS**, 94 Ga. 229 (1894), it was held (per syllabus by the court) that “where, without the knowledge of the conductor or the engineer, some unauthorized person applied a brake to the car attached to a dummy engine on a street railway while the engine and cars were ascending a steep grade, and thus the progress of the engine was arrested, whereupon the conductor, in order to enable the engineer to go forward, had the brake taken off, and the engineer not knowing that the brake would be taken off, and intending to go backward down the grade, reversed the engine at about the same moment when the brake was taken off, and in consequence of this inharmonious action of two minds under pressure of the emergency, each intending a proper object and neither knowing of the intention of the other, the train backed too rapidly, and consequently collided with a wagon which was not expected to be on the track and not known to be on it until it was too late to stop, and which would not have been there but for the mules drawing it having become suddenly frightened by the backward movement of the train, the calamity was a pure accident, and the driver of the mules, who sustained a personal injury in consequence of the collision, cannot recover.” Judgment for plaintiff in the Floyd Superior Court reversed. **DEAN & DEAN** appeared for plaintiff in error; **G. & W. HARRIS**, and **FOUCHE & FOUCHE**, for defendant in error.

RIGHT OF ONE RAILROAD TO SUE ANOTHER RAILROAD FOR DAMAGE SUSTAINED IN COLLISION—DECLARATION — DEMURRER — ORDINANCE — NOTICE.—In **CENTRAL RAILROAD AND BANKING CO. v. BRUNSWICK AND WESTERN RAILROAD CO.**, 87 Ga. 386 (1891), it was held (per syllabus by the court) as follows: “1. Where a railroad company and its employee are both injured by the same negligence of another railroad company, the first company has no right, in an action for its own damages against the second, to sue also for the use of its employee to recover the damages sustained by him in excess of those already paid to him by the plaintiff in the action.

“2. Railroad companies and their employees using railways in a city must take notice of all valid city ordinances duly promulgated.

“3. Where a collision between the plaintiff's train and the defendant's train occurred on a track used by them in common, while the plaintiff or its agent was engaged in the violation of a valid city ordinance limiting the rate of speed in the running of trains in the

city, and the jury believed from the evidence that the collision would not have occurred but for such violation, the plaintiff could not recover; it not appearing that the defendant could have avoided the consequences of the plaintiff's negligence after becoming aware of the same.

"4. If a city ordinance regulating the speed of trains embrace in its language the whole area of the city, and is reasonable in itself, the court may submit to the jury the question as to whether, on account of the special local conditions and surroundings, it would or would not reasonably apply to the particular locality in question, that locality being just inside of the city limits."

The facts of the case are stated in the opinion by SIMMONS, J., as follows: "The Central Railroad and Banking Company brought an action against the Brunswick and Western Railroad Company, alleging that an engine belonging to plaintiff had been damaged to the amount of \$1,000, and its engineer, Scoville, had been seriously injured by a collision between said engine and a train of defendant, which resulted from the negligence of the latter. The declaration set forth in detail the injuries alleged to have been sustained by the engineer. It also alleged that plaintiff had paid out large sums of money, specifying the amounts, for expenses incurred in the nursing of the engineer, physicians' and druggists' bills, and also that plaintiff had compromised and settled the claim of said Scoville against it for the injuries he had sustained by paying the sum of \$2,000, which was inadequate and insufficient to compensate him for the damage he had sustained. The declaration prayed a recovery against defendant, not only for the damage to its property and the sums paid out for and to Scoville, as aforesaid, but also for the damages sustained by him in the personal injuries he had received in excess of the amount paid him therefor by plaintiff, the latter alleging that it sued for this last-named item for the use of the said Scoville. Upon demurrer, the court below struck out of the declaration all parts thereof that sought a recovery for the use and benefit of Scoville, and this ruling is assigned as error. There can be no question that plaintiff had the right to sue for any injuries to its own property, or for any injury it may have sustained in the loss of its engineer's services, and expenses flowing directly therefrom, which may have been caused by defendant's negligence. But we are at a loss to perceive how the plaintiff can maintain an action for personal injuries received by Scoville for any amount exceeding what it had actually paid him on this account. For injuries received by him, and for which no compensation had been made to him by plaintiff, he, and he alone, in our opinion, would be entitled to sue the

defendant. * * * The court, therefore, did not err in sustaining the demurrer to so much of the declaration as sought a recovery for the use of Scoville."

The other points are sufficiently stated in the syllabus by the court, *supra*. Judgment affirmed.

GEORGIA COLLISION AND CROSSING CASES. — In addition to the Georgia cases relating to collisions and accidents on railroad tracks and at crossings, reported in this volume, *ante*, are the following, many of which will be found cited in several of the reported cases, *supra*:

Holmes *v.* Central R. R. & Banking Co., 37 Ga. 593 (person run over at railroad crossing); Ga. R. R. & B. Co. *v.* Wynn, 42 Ga. 331 (collision between wagon and train at crossing); Central R. R. Co. *v.* Glass, 60 Ga. 441 (intoxicated person run over on track); Hendricks *v.* Western & Atl. R. R. Co., 52 Ga. 467; 53 Ga. 12 (accident on track); Southwestern R. R. Co. *v.* Johnson, 60 Ga. 667 (person killed on track); Ga. R. R. Co. *v.* Cox, 61 Ga. 455 (mule killed at crossing); Western & Atl. R. R. Co. *v.* Jones, 65 Ga. 631 (horse killed at crossing); Ga. R. R. Co. *v.* Carr, 73 Ga. 557 (horse frightened by noise at crossing and person driving injured); Brunswick & W. R. R. Co. *v.* Hoover, 74 Ga. 426 (person killed while driving across track); Ga. R. R. Co. *v.* Williams, 74 Ga. 723 (person struck by train while walking on track); Central R. R. Co. *v.* Russell, 75 Ga. 810 (horse killed and wagon destroyed in collision at crossing); Morgan *v.* Central R. R. Co., 77 Ga. 788 (driving across track at crossing); Rich. & Dan. R. R. Co. *v.* Howard, 79 Ga. 44 (person killed on track); Western & Atl. R. R. Co. *v.* Young, 81 Ga. 397 (child injured while crossing track); Central R. R. & B. Co. *v.* Raiford, 82 Ga. 400 (struck at street crossing); City & Suburban R'y Co. *v.* Waldhaur, 84 Ga. 706 (boy riding velocipede run into by street car); Atl. & W. P. R. R. Co. *v.* Loftin, 86 Ga. 43 (person injured while crossing track); Ga. Mid. R. R. Co. *v.* Evans, 87 Ga. 673 (child killed at crossing); Chattanooga, Rome & Col. R. R. Co. *v.* Huggins, 89 Ga. 494 (passenger injured in collision between trains); Ga. R. R. & B. Co. *v.* Daniel, 89 Ga. 463 (person walking on track struck by train); Richmond & Dan. R. R. Co. *v.* Johnston, 89 Ga. 560 (child killed at crossing); Met. St. R. R. Co. *v.* Johnson, 90 Ga. 500 (person struck by street railway car at crossing); Ga. Southern & Fla. R. R. Co. *v.* Williams, 93 Ga. 253 (driver killed in collision with train at private crossing); Savannah, Thunderbolt, etc., R'y Co. *v.* Beasley, 94 Ga. 142, and Savannah T., etc., R'y Co. *v.* Bryan, 94 Ga. 632 (collision between wagon and street car);

Bowen *v.* Gainesville, etc., R. R. Co., 95 Ga. 688 (mule frightened by noise of train and driver injured while crossing track); Brunswick & Western R. R. Co. *v.* Gibson, 97 Ga. 489 (person killed while crossing track); McElroy *v.* Ga. C. & N. R'y Co. (1896), 98 Ga. 257 (person injured on bridge or trestle used as highway; failure to ring bell); Comer, Receiver, *v.* Shaw (1896), 98 Ga. 543 (person killed while crossing track); Middle Ga. & Atl. R. R. Co. *v.* Reynolds (1896), 98 Ga. 638 (child injured on track); Western & Atl. R. R. Co. *v.* Stafford (1896), 98 Ga. 187 (injured while driving across track).

HOPKINS *v.* UTAH NORTHERN RAILWAY COMPANY.

Supreme Court, Idaho, January Term, 1887.

[Reported in 2 Idaho, 277.]

ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE — PRACTICE — DISCRETION OF COURT — APPEAL — PRESUMPTION. —

1. Where a suit is brought against a railroad company to recover damages for injury to property by reason of the negligence of the agents or servants of the company, and defendant relies upon such contributory negligence of the plaintiff or his servant so as to prevent a recovery, this is a defense to be established by the defendant.
2. It is a general rule that a defendant should not open the defense by a cross-examination of plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court.
3. Where a refusal to give instructions requested by a party is assigned as error, the Supreme Court will look into the entire charge to determine whether such refusal was prejudicial; and, where the record shows that a charge was given which is not brought here for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict.

(Syllabus by the Court.)

APPEAL from District Court, Bingham County.

Action by R. H. Hopkins against the Utah Northern Railway Company to recover damages for the killing of plaintiff's horses by one of defendant's engines. From a judgment for plaintiff, defendant appeals. *Judgment affirmed.*

P. L. WILLIAMS and HOMER STULL, for appellant.

SMITH & WRIGHT, for respondent.

Broderick, J. — This action is to recover damages for killing a team of horses, and the destruction of a wagon and harness

of the plaintiff, which is alleged to have been caused by the negligence of the defendant company, about the first day of November, 1885, near Blackfoot, in this territory. The complaint alleges, in substance, that defendant was a corporation duly incorporated, etc.; that plaintiff was the owner of a team and wagon worth \$450; that, at a time and place named, the team and wagon were negligently run against and over by defendant's locomotive, the team killed, and wagon and harness damaged; that the accident happened through no fault of plaintiff, but resulted from the carelessness and negligence of the agents and servants of the defendant; and that by reason of such negligence the plaintiff was damaged in the sum of \$350. The defendant answered, denying specifically each allegation of the complaint except that defendant was a corporation. In May, 1886, the case was tried before the court with a jury, which resulted in a verdict and judgment in favor of the plaintiff for \$225 and costs. The defendant moved for a new trial. Motion overruled by the court, and from this order and the judgment the defendant appeals, and assigns as error: *First*, that the evidence is insufficient to justify the verdict of the jury, in this: that it does not show that the defendant was negligent in the premises, or that any negligence on its part caused the injury complained of, and constituting the cause of action herein; and in that it does show that the plaintiff's servant, Charles Chestine, who was driving the team, was negligent in not looking along the track to discover the approach of an engine as he neared the crossing, and that his negligence in that connection caused, or contributed to cause, the injury complained of; *second*, errors in law occurring at the trial, and excepted to by defendant, in excluding certain evidence sought to be introduced by cross-examination of plaintiff's witnesses; *third*, that the court erred in refusing to give certain instructions to the jury requested by defendant's counsel.

The evidence is undisputed that the team and the train were coming from the north; that the train was running at rapid speed; that the highway upon which the team was moving, for some distance above the crossing, runs nearly parallel with defendant's road; that about eighty rods above the crossing was a whistling post; that the accident happened at the crossing, and at the time stated in the complaint. The rules of defendant in force at the time of the alleged accident were identified and received in evidence at the trial, but do not appear in the record.

The case seems to have been tried, however, on the theory that the rules required the whistle sounded when a train was nearing a crossing, and we think there is sufficient proof in the record which we may infer, for the purposes of this appeal, that this was the requirement of the rule. Each party introduced evidence before the court and jury, as to whether or not the whistle was sounded, or other signal given, before the engine reached the crossing, and on this question there seems to have been a substantial conflict in the testimony, all of which was submitted to the jury, and the question is settled by the verdict.

But it is contended that even though the defendant was negligent, that the plaintiff, by the carelessness of his servant who was at the time in charge of the team, contributed to the result and injury, and that, therefore, the defendant is not liable. In this case the burden was on the plaintiff to prove, in the first instance, that his property was injured and destroyed, for which he seeks redress, and that such injury was done by the locomotive of the defendant at or about the time and place charged in the complaint, and that such injury was the result of negligence of the agents and servants of the defendant. These facts proven, with the amount of damages sustained, made a *prima facie* case for the plaintiff. Then the burden shifted to, and was cast on, the defendant to overcome the case made by the plaintiff, by showing that the agents and servants of defendant were on this occasion exercising due care and caution; or, if it relied on such contributory negligence of the plaintiff or his agent as to prevent a recovery of judgment by plaintiff, that was a defense to be proven and established by defendant. *Railway Co. v. Gladmon*, 15 Wall. 401; *Ind. & St. L. R. R. Co. v. Horst*, 93 U. S. 291, 7 Am. Neg. Cas. 331. We are aware that there has been a contrariety of opinion on this question, but we are entirely satisfied with the rule as settled by the above-cited authorities.

We see no error in the ruling of the trial court in excluding the evidence sought to be adduced by the defendant by cross-examination of plaintiff's witnesses as tending to show contributory negligence on the part of plaintiff's servant. It is a general rule that the defendant should not open his case by a cross-examination of plaintiff's witnesses; but the application of this rule must necessarily rest largely in the sound discretion of the trial court. The record shows, however, that the defendant, to make out its defense, was permitted to introduce all evidence offered as to the

negligence of plaintiff's servant, and this question was also submitted to the jury. In this state of the case it is unnecessary to determine here whether, under our practice, the defendant should have pleaded contributory negligence as a predicate for the proof on this point or not.

The remaining question is as to the instructions requested by defendant's counsel, and refused by the court. Counsel contend that the evidence shows that the accident happened in a level, open country, where there was no obstruction to prevent the driver from seeing the approaching engine in time to have stopped or turned aside, and thus have avoided the collision; and that the instructions refused were proper, and should have been given to direct the attention of the jury to these facts. It is doubtless the duty of a person approaching a railroad crossing to listen and look if he is in a position where looking will avail him; and if, under all the circumstances, he has reason to suspect or apprehend danger, and does not use his senses, but heedlessly goes on, and is injured in person or property, he alone is responsible for the consequences of such negligence. But in this case the teamster was driving in advance of the approaching train, with his back towards it, and he testifies, in substance, that he heard no signal of any kind, and saw nothing to indicate danger, until within a short distance of the crossing, and where the highway gradually turned towards the crossing, and that then and there the horses became affrighted, and commenced jumping and plunging towards the crossing; that he was wholly unable to stop or manage them; that he finally sprang out of the wagon in time to save himself harmless; that the collision took place; that the horses were killed, and the wagon and harness destroyed. There is other evidence which corroborates this testimony.

The trial court is required to give such instructions as are applicable to the issues and facts of each case, but is not required to state propositions of law, however sound they may be, which are not applicable, and will not aid the jury in reaching a correct conclusion. *Ind., etc., R. R. Co. v. Horst, supra*; *U. S. v. Camp*, 2 Idaho, 215, 10 Pac. Rep. 226.

The record shows that an instruction defining negligence, etc., was given, which nowhere appears in the transcript. It has been held by this court that, in determining whether an instruction given was prejudicial, the entire charge should be looked into; and if the charge, as a whole, fairly presented the case to the

jury, that the verdict would not be disturbed. *People v. Bernard*, 2 Idaho, 178, 10 Pac. Rep. 30. The same rule will apply where instructions are refused. The reason for the rule is apparent.

We are here asked to reverse a judgment because certain instructions calling the attention of the jury to the alleged negligence of the plaintiff were refused, and it appears from the record that an instruction was given by the court, of its own motion, on this question; but the instruction, as given, is not brought here for our examination. Every intendment is in favor of the judgment, and the regularity of the proceedings; and the presumption is, until the contrary appears, that the court gave the instructions necessary and proper, under the facts of the case, to assist the jury in arriving at a just verdict. This presumption cannot be overthrown by a partial view of the instructions given. Those not given may have been refused for the reason that they had been substantially given. If so, the court was not bound to repeat them.

No error appearing, the judgment is affirmed. HAYS, Ch. J., and BUCK, J., concurred.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY V. GEORGE.

Supreme Court, Illinois, April Term, 1858.

[Reported in 19 Ill. 510.]

- COLLISION BETWEEN TRAINS — JOINT TORT FEASORS — TIME TABLES — EVIDENCE.** — In an action for injuries sustained by a collision of railroad cars, where two companies run upon the same track, and a question arises as to which of the two roads is in fault, the running time of trains may be shown by other proof than the time tables of the companies.
- MEDICAL ASSISTANCE — WITNESS.** — A person not a physician may testify whether it was necessary for a party to receive medical assistance, and the length of time such assistance was necessary.
- CARRIERS OF PASSENGERS — DEGREE OF CARE.** — Carriers of passengers for hire are bound to use the utmost care and diligence in providing for their safety. But if the negligence of the passenger produces the injury without the fault of the carrier, the carrier is not liable.
- RULES AND REGULATIONS.** — Railroad companies may provide proper rules for the running of trains, and conform to them, or be responsible for all consequences.
- INSTRUCTIONS — EVIDENCE.** — Instructions not based upon evidence should not be given.

APPEAL from the Common Pleas of the City of Aurora.

“Action on the case, brought by the appellee for injuries to his person, alleged to have occurred by the negligence of the appellant in running its cars. The injury was alleged to have been occasioned by a collision between the cars of the Chicago, Burlington and Quincy train and the Galena train, at Wheaton, Du Page county, on the 27th of August, 1857. The declaration is in the usual form, for negligence, and the plea, not guilty. The case was tried at the December term of the Common Pleas of the city of Aurora, Kane county, before Gibson, Judge, and a jury. A verdict was rendered for the appellee for \$1,300. The motion for a new trial was made and overruled, from which defendant appeals.” Further facts appear in the opinion. *Judgment affirmed.*

I. N. ARNOLD and W. B. PLATO, for appellant.

LELAND & LELAND and PARKS & FRIDLEY, for appellee.

Walker, J. — This was an action on the case brought by George against the Chicago, Burlington and Quincy Railroad Company for injuries to his person, which were alleged to have been received by the negligence of the railroad company in running their cars. The injury was occasioned by a collision between the cars of the Galena and Chicago Union Railroad Company and the Burlington, Chicago and Quincy Railroad Company, near Wheaton, in Du Page county, on the 27th of August, 1857. The declaration is for negligence, and is in the usual form. The defendants plead the general issue, and the case was tried at the December term, 1857, by the Court of Common Pleas of the city of Aurora, and a jury. The jury found a verdict for plaintiff for the sum of \$1,300. Defendants entered a motion for a new trial, which was overruled by the court, and judgment was rendered on the verdict, from which defendant appeals to this court.

It is urged that the court below erred in permitting witnesses to testify to the time the trains were due at Wheaton, when there was a time table at that place, and the witnesses testified they had got their information of when the trains were due from that time table. The issue to be determined was whether the defendant was in fault, and it was pertinent to that issue to know when the several trains were due at that place. This was a fact to be established, and it might be done in either of several ways. It might be proven by the admissions of the defendant, or by proving that the trains had regularly arrived at that point at a

particular time before this collision; and it might have been proven by producing and laying the proper foundation for the admission of this time table. The question was not what was the contents of this printed paper, but when should the cars have arrived at that point. The witnesses testify that the defendant's train from the east was due at ten o'clock and forty minutes in the forenoon, and the Galena train, from the west, was due at three o'clock and thirty or thirty-two minutes in the afternoon, and that, for some time previous to the collision, they had run to their time. When it is proven that the trains of the two companies using this road had previously arrived regularly at a particular time the conclusion is irresistible that they had been running according to their regulations. It was, by such evidence, as satisfactorily proven as it could have been by producing the time table. The plaintiff was not a party to the contents of that paper, and it, at most, was only a printed statement made by defendant, and as such plaintiff was not bound to rely upon it as evidence. The written statement of facts by a party to the suit is not admissible as evidence unless the opposite party makes it evidence; and if the other party sees proper to prove the fact without using such written statement, he has no right to complain. The witnesses' statements that they derived their information from the time table was a mere inference, which the other portions of their evidence show to have been such. They testify that they were employees of the road at this place, and that the trains previously had arrived regularly at the times named, and their inferences should not be received to the exclusion of the facts testified to by them.

It was urged that the witness Lewis was improperly permitted to testify whether it was necessary for the physicians to have continued their attendance on plaintiff as long as they did. Even if this was a question of skill, the physicians had testified to having attended on plaintiff, and from that testimony the inference is raised that it was necessary. But in a question of this kind any person of intelligence is capable of judging of the necessity of medical advice and services. It is universally acted upon by all classes of mankind, and we are not disposed to lay down a rule that none but a physician is competent to prove that a person is sick, or so sick as to require medical advice. When it comes to determine the nature or the effects of disease, it is

different. These are scientific questions that none but those skilled in the science are competent to determine.

Numerous errors are assigned for refusing to give instructions asked by defendant of the court below. To determine the correctness or incorrectness of the judgment of the court in refusing to give the instructions it will be necessary to advert to the facts proven on the trial of the case. It appears from the evidence that the defendant and the Galena and Chicago Union Railroad Company used this portion of the road jointly; that the plaintiff was a passenger on the defendant's cars, and was injured by having his collar bone broken, etc.; that this train of defendant's was due from the east at ten o'clock and forty minutes in the forenoon, and that the Galena train was due from the west at three o'clock and thirty or thirty-two minutes in the afternoon; that the Galena train was due at Wheaton in two or three minutes after the defendant's train passed that point; that when the collision occurred the switch tender was expecting and listening for the collision. The evidence showed that plaintiff was in the front part of the forward passenger car when he received the injury complained of, and this is the only evidence as to how the plaintiff acted, or what he did, at the time he was injured. The rule is well settled, and universally acquiesced in, that common carriers of property are held liable for all accidents and injuries it may receive, except from the acts of God and the enemy of the country. And it seems to be the rule that carriers of passengers for hire are bound to use the utmost care and diligence in providing for their safety, by the use of sufficient and suitable modes of conveyance, in order to prevent those injuries which human care and foresight can guard against. Having thus provided the means of transportation, they are, in like manner, to use the utmost care and diligence in managing, directing and using those means so that, as far as human care and foresight can go, they may guard against injury. Having done all that human care and foresight can do reasonably, and injury happening, they are not liable. Pure accidents will excuse them. They are not liable at all events, and the negligence of the passenger producing the injury, without their fault, will also relieve them from liability. But the magnitude of the value of human life is such that it requires of carriers of passengers this degree of care and foresight. This view of their liability will be found to be supported by the cases of *Christie v. Griggs*, 2 Camp. 79; *Aston v.*

Heaven, 2 Esp. 533 (1); *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 9 Am. Neg. Cas. 426; *Caldwell v. Murphy*, 1 Duer, 233, affirmed in 11 N. Y. 416, 9 Am. Neg. Cas. 587, n. When, by the increased facilities for travel, so large a portion of the population of our country are intrusted to the care of carriers of passengers by railroads and steamboats, and accidents are so lamentably frequent it would not be proper to relax this rule, for upon it depends the safety of the traveling public.

It was the duty of these defendants to have adopted such rules and regulations for the running their trains as would insure safety, and having adopted them, they must conform to them or be responsible for all consequences resulting from a departure from them. The evidence shows that the defendants' train was running several hours out of time when the collision occurred. They, in doing so, must have known the hazard they ran, and that the other train, without a mere chance, would be on the road at the time and place where the collision occurred. And the defendants, by so running, were at the least guilty of gross negligence, if the act was not wilful.

They asked the court to instruct the jury that if the injury was occasioned by the negligence of the Galena and Chicago Union Railroad Company they would find for the defendants. This the court properly refused, as there was no evidence to base it upon. That company was running its train on time. The train was at the proper place on the road, and was in no fault. They asked the court to instruct the jury that if they believed from the

1 In *Christie v. Griggs*, 2 Camp. 79, an action against a proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff, traveling by it as a passenger, was hurt, it was held that to prove negligence it is *prima facie* enough to give evidence of the coach having broken down; from which negligence will be presumed.

In the case of *Christie v. Griggs*, *supra*, Chief Justice Mansfield says: "I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the

driver was as skilful a driver as could anywhere be found. * * * When the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded, and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a *mere accident*."

In *Aston v. Heaven*, 2 Esp. 533, it was held that coach owners are not liable for injuries happening to passengers from accident or misfortune, where there has been no negligence or default in the driver.

evidence that both parties were guilty of negligence or want of care, that they should find for the defendants. The court properly refused this instruction, as there was no evidence of negligence or want of care on the part of plaintiff. They asked the court to instruct the jury that unless they believed from the evidence that defendants' train was not entitled to the road when the collision occurred they should find for the defendants. The court properly refused this instruction, as there was no evidence tending to show that they were entitled to the road, but all the evidence showed that they were not entitled to it when the collision occurred. They also asked the court to instruct the jury that if they believed from the evidence that the Galena and Chicago Union Railroad Company had the sole control and regulation of the time and manner of running all trains on the road where the accident occurred, and that defendants' train at that time was run according to such rules and regulations, and that it occurred by or was the result of following such rules, that then the Galena and Chicago Union Railroad Company are liable, and they should find for defendants. This instruction was also properly refused. It assumed that the defendants were running on time when the collision occurred, when the evidence shows they were not, and there was not a particle of evidence tending to show they were running in conformity to the regulations of the road. To have given any of these instructions would have tended to mislead the jury and bring before them mere abstract propositions. The court did right in refusing them. Upon a careful examination of this whole record we are unable to perceive any error, and the judgment of the court below should be affirmed.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY v. PARKS.

Supreme Court, Illinois. January Term, 1878.

[Reported in 88 Ill. 373.]

PASSENGER INJURED IN COLLISION — DAMAGES. — In an action to recover damages for injuries sustained by plaintiff, a female passenger on defendant's train, caused by the train colliding with an engine upon the track as the train arrived at the station, due to gross carelessness on defendant's

part, it was held that a verdict for \$8,958 damages was not excessive, where it appeared that plaintiff's spine was permanently injured, and she was a teacher by profession (1).

APPEAL by defendant from judgment for plaintiff rendered in the Circuit Court, De Witt county. The facts appear in the opinion. *Judgment affirmed.*

A. J. GALLAGHER and MOORE & WARNER, for appellant.

DONAHUE & KELLY and WELDON & HUGHES, for appellee.

Dickey, J. — This was an action brought by Mrs. Parks against the Illinois Central Railroad Company to recover damages for an injury alleged to have been received by the plaintiff through the carelessness of defendant's servants. Plaintiff was a passenger traveling north in a passenger train of defendant early in the month of September, 1873, and arrived at Wapello in the

1. For other Illinois cases relating to Passengers Injured in Collisions, see the following: CHICAGO R. I. & P. R. *v. McAra*, 52 Ill. 296 (1869), plaintiff injured by derailment of train caused by collision with cow on track; judgment for \$5,000 reversed on the ground of excessive damages; TOLEDO, WABASH & WESTERN R. R. Co. *v. Foss*, 88 Ill. 551 (1878), collision of train with horse; judgment for plaintiff reversed for erroneous instruction on railroad's negligence in failing to use air brakes, etc., where declaration simply averred negligence in careless running of train; ATCH. TOP. & SANTA FE R'y Co. *v. ELDER*, 149 Ill. 173 (1894), collision with cow on track; judgment for plaintiff for \$2,500 affirmed; NORTH CHICAGO ST. R'y Co. *v. COTTON*, 140 Ill. 486 (1892), collision between street cars in tunnel; judgment for plaintiff affirmed; mere fact of injury raised presumption of negligence; CHICAGO & ALTON R. R. Co. *v. WILSON*, 63 Ill. 167 (1872), passenger struck by train at station platform; judgment for plaintiff for \$8,000 affirmed; see 9 Am. Neg. Cas. 252; ILL. CENT. R. R. Co. *v. O'KEEFE*, 154 Ill. 508 (1895), person riding on free pass, killed in collision with freight train; judgment for plaintiff re-

versed for erroneous instruction that it was not negligence for the deceased to ride on platform or steps of car, that question being for the jury; CHICAGO, B. & Q. R. R. Co. *v. DICKSON*, 143 Ill. 368 (1892), injury to stockman in collision; judgment for plaintiff affirmed; CHICAGO & ALTON R. R. Co. *v. RAYBURN*, 153 Ill. 290 (1894), stockman struck by train while passing along track to his car; judgment for plaintiff reversed for erroneous instructions; CHICAGO, B. & Q. R. R. Co. *v. HAWK*, 36 Ill. App. 327 (1889), person riding on free pass injured in collision; judgment for plaintiff reversed on the ground of contributory negligence; see also decision in same case, 42 Ill. App. 322 (1889), where the Appellate Court having reconsidered the case arrived at same conclusion for reversal; UNION RAILWAY & TRANSIT Co. *v. SHACKLET*, 19 Ill. App. 145 (1886), judgment in favor of plaintiff for death of intestate, a stockman, who was killed in collision between trains in the stock yard, affirmed. The cases cited *supra* are either reported in full, or cited as notes, with the Illinois cases in 9 AM. NEG. CAS., classified among the cases relating to ACCIDENTS ON TRAINS, etc.

morning by six o'clock. She was traveling in the sleeping car. When the train arrived at the station of Wapello, in moving up to the station, the engine by which the train was drawn came in collision with another engine upon the track with such violence that the brake-beam of one engine and the iron rods on the front of the other engine were broken.

At the time of the collision plaintiff was standing in the wash room, combing her hair, both of her hands being raised to her head. By the collision she was thrown suddenly against the door, striking against the knob, and fell to the floor with an exclamation. She was immediately carried to a sofa by the porter and brakeman, and seemed so seriously injured that a local physician was immediately sent for. She remained in the sleeping car until that afternoon. The railroad surgeon living at Amboy was sent for and arrived that afternoon. In charge of this surgeon she was taken in the sleeping car that evening to Mendota, where she lay some three or four weeks under the care of the surgeon of the railroad company. She went thence to Iowa, to the house of a friend, and afterwards to her father's residence in Albany, New York. It is claimed by plaintiff that her spine was injured by the collision or fall, and that to such a degree that she was rendered incapable of effective labor, either physical or mental, and that the injury is permanent.

The defendant insists that her spine was not injured, that the injury was temporary, and that the symptoms indicating serious injury exhibited by plaintiff from time to time were feigned. She was a lady of education and by profession a teacher. The cause was tried by a jury in March, 1875, and a verdict rendered for the plaintiff for \$8,958, on which judgment was rendered, and the defendant appeals to this court.

It is insisted by appellant that the damages, in view of the evidence, are excessive to such a degree that the verdict should have been set aside, and that the court erred in overruling the motion for a new trial in that regard.

The testimony is very voluminous, and as to many of the details in the history of her case is very contradictory. It is not seriously denied that the plaintiff had a cause of action. From the testimony of defendant's own witnesses it is apparent that the collision was the result of gross carelessness, and that the plaintiff was injured thereby. The contradictions in the testimony all relate merely to the degree of the injury and as to

whether it is of a permanent character. It was peculiarly a matter within the province of the jury to pass upon the credibility of witnesses testifying to circumstances bearing upon this question. It seems that the jury gave credence to the testimony for the plaintiff, rather than that produced by the defendant.

While the damages are large, yet if the truth be as stated by plaintiff and her witnesses we cannot say that they are so excessive as to demand that the verdict should be set aside upon that ground.

Appellant insists also that the court erred in refusing to suppress the deposition of Rachel Alexander, taken October 27, 1874. This motion, by the record, seems to have been overruled on the 7th day of December, 1874, and the bill of exceptions signed by the judge, relating to that decision, was filed upon the 31st day of December, 1874, and therefore must have had relation to a deposition placed on file before that date, whereas an examination of the evidence read and given at the trial does not show that *this* deposition was read at all, but does show that a deposition of the same witness was read which was filed March 17, 1875. The deposition called in question by the motion to suppress not having been read in evidence, it is not material whether the court decided correctly or not in refusing to suppress it.

Again, appellant complains that the court refused, at the March term, 1875, to continue the cause on account of the absence of the deposition of Dr. Twining. The abstract fails to show at what time in the term this motion was made, but the record shows it was made the 23d day of March, 1875. The abstract does not show that the motion was ever decided or that any exception was ever taken to any ruling of the court on that question, nor do we find anything in the record on that subject; but it is shown by the abstract that the deposition of Dr. Twining was placed on file on the 26th of March, 1875, three days after the motion was overruled, and was read at the hearing.

It is next insisted that the depositions of Benedict and Becket should have been read. The abstract shows that the deposition of Benedict was excluded by the court below, but neither the substance nor the subject of the deposition is set out, nor does the abstract show that any exception was taken to the ruling of the court in that regard, and the abstract further shows that the deposition of Becket was, in fact, read.

Again, it is insisted that the court erred in sustaining the demurrer to the defendant's second and fourth pleas. The abstract fails to set out either the demurrers or pleas so as to enable this court to determine whether the demurrers should or should not have been sustained, and the abstract shows that (whether the rulings in that regard were right or wrong) replications were subsequently filed to defendant's second, third and fourth pleas and issues joined thereon. If the pleas were not amended, the filing of replications operated as a waiver of the demurrers, and if the pleas were amended, the plaintiff failed to demur to the pleas as amended. He cannot insist upon exception to the ruling of the court in sustaining demurrers to the pleas before they were amended.

Other exceptions are taken by appellant's counsel to the rulings of the court on the trial, and to the rulings of the court in settling instructions. After a careful examination of the points presented we find no material error, and deem it unnecessary to review them in detail.

The judgment must be affirmed.

WEST CHICAGO STREET RAILROAD COMPANY V. MARTIN (1).

Supreme Court, Illinois, January Term, 1894.

[Reported in 154 Ill. 523.]

PASSENGER ON STREET CAR INJURED IN COLLISION BETWEEN STREET CAR AND TRAIN — EVIDENCE — CONTRACT BETWEEN RAILROADS JOINTLY SUED. — In an action to recover damages for injuries to a passenger on a street car, caused by a collision between the street car and a train, which accident was alleged to be due to the joint negligence of the railway company and the street railroad company, where a contract defining the duties of the street railroad company towards the railroad company, such contract not imposing any duty not imposed by law, was admitted in evidence, it was held that the admission of such contract, though improper, was harmless (2).

INSTRUCTION — PRESUMPTION — SUBMITTING CASE NOT MADE BY DECLARATION — OBJECTION — PRACTICE — VARIANCE. — In such action it was held that an instruction that an injury to a passenger on a street car by a collision raises a presumption of negligence, although

1. Affirming same case, 47 Ill. App. 610.

2. See note on Passengers Injured in Collisions on Street Railroads, in 8 Am. Neg. Rep. 322-327.

improper, where plaintiff did not proceed upon the theory of presumptive negligence, but charged specific acts of negligence, was not cause for reversal where such instruction was not asked by plaintiff but by a co-defendant, and no specific objection was made to it on the trial on the ground that it submitted a case to the jury not made by the declaration.

• APPEAL from the Appellate Court for the First District — heard in that court on appeal from the Superior Court of Cook county. The facts are stated in the opinion. *Judgment affirmed.*

KEEP & LOWDEN, for appellant.

RICHOLSON, MATSON & PEASE, for appellee.

Baker, J. — This is a joint action on the case, against the appellant and the Chicago and Northwestern Railway Company, for injuries sustained by the appellee. The declaration consists of three counts. The first count alleges that the tracks of the West Chicago Street Railroad Company cross the tracks of the defendant, the Chicago and Northwestern Railway Company, at Rockwell street, and that the defendant, the Chicago and Northwestern Railway Company, was negligent in that it failed to give warning of the approach of its train by means of lights, bells or whistles, setting up an ordinance of the city of Chicago as to that duty, and further alleging that the defendant, the West Chicago Street Railroad Company, was guilty of negligence because it, by its agents or servants, failed to go forward upon the tracks of the defendant, the Chicago and Northwestern Railway Company, because of which joint negligence the street car in which plaintiff was riding was struck by the railroad train and plaintiff injured, etc. The second count charges negligence of the defendant, the Chicago and Northwestern Railway Company, in that no proper lookout was kept upon a certain engine running along and upon the tracks of the said defendant, propelling certain cars attached thereto, and in that no proper lookout was kept by gatemen in its employ at the crossing aforesaid, and charges negligence on the part of the defendant, the West Chicago Street Railroad Company, in that it failed to go forward, by its agents or servants, to a position upon the tracks of the said defendant, the Chicago and Northwestern Railway Company, where said fact would be ascertained, to learn whether the cars of the defendant railway company were approaching said crossing, whereby the street car was struck and plaintiff injured, etc. The third count sets out the ordinance of the city of Chicago, regulating the speed of railroad trains, and alleges negligence on the

part of the defendant railway company, "in that the said defendant railway company carelessly and negligently then and there drove along and upon their tracks aforesaid, certain cars propelled by a locomotive engine at a high rate of speed, to wit, at the rate of thirty miles per hour," and in that it, by its agents or servants, failed to give the defendant, the street railroad company, any signals of the approach of the said train, either by means of gates, flags, bells or whistles and charges that the defendant street railroad company failed to exercise the due care imposed upon it by law, and was guilty of negligence in that it failed, as aforesaid, to use the means at its command to ascertain whether or not said train was approaching upon the tracks of the defendant railway company. There was a trial by jury and a verdict against defendants jointly, for \$12,000 damages, and judgment on the verdict. The West Chicago Street Railroad Company alone appealed to the Appellate Court, and on a hearing in that court the judgment of the Superior Court was affirmed, and said appellant now appeals to this court.

No claim is made that the plaintiff asked or procured the trial court to give any erroneous instructions, or that error of any kind was committed by that court at his instance. The case presents the anomaly of a court of review being called upon to reverse a judgment in favor of a party plaintiff against two joint defendants for errors alleged to have been committed, not at the instance of such plaintiff, but upon the application and motion of one of the joint defendants; and this judgment at law against the defendants below is a unit, and it cannot be reversed as to one of them and affirmed as to the other. (*Jansen et al. v. Varnum et al.*, 89 Ill. 100). In other words, a reversal of the judgment would, as to one of the defendants, the Chicago and Northwestern Railway Company, be a reversal for errors committed at its own request.

The first error assigned is the admission in evidence of a contract between the Chicago and Northwestern Railway Company and the Chicago West Division Railroad Company, of which latter company the defendant, the West Chicago Street Railroad Company, is the successor. Said contract sets out the mutual duties of the parties thereto with reference to the maintenance of the crossing at Madison and Rockwell streets, and contains, among other things, this provision: "The party of the first part agrees to take all needful precautions to prevent collisions at

said crossing, and for that purpose it shall be the duty of the employees of the party of the first part to ascertain, before attempting to effect a crossing, whether an engine or train of the party of the second part is approaching Madison street, in either direction." This agreement was offered in evidence by the defendant railway company, and allowed to go to the jury over the objections of the street railroad company.

The admission in evidence of this agreement was, under the issues and circumstances of the case, so clearly improper that no attempt even is made to justify it. It, of course, had no effect or tendency to relieve the railroad company from responsibility. We think, however, that its introduction as testimony was harmless. The contract imposed upon the street railroad company no duty which the law itself, under the allegations of the declaration, did not impose upon it, and, therefore, the agreement in no way increased its liability; and the jury could not have been misled by its production before them, for the court gave them the two following instructions:

"The court instructs the jury, as a matter of law, that under and by virtue of the contract between the defendants, offered in evidence, the defendant, the West Chicago Street Railroad Company, was bound to exercise no higher degree of care in order to see the approach of the train of the defendant, the Chicago and Northwestern Railroad Company, than it would have been in the absence of such contract."

"The court instructs the jury, as a matter of law, that the contract between the defendants, offered in evidence, creates no new duty upon the defendant, the West Chicago Street Railroad Company, so far as the plaintiff is concerned, nor does it change or affect the rights of the plaintiff in this case."

It is urged that there was error in giving the first and the fourth of the instructions asked by the Chicago and Northwestern Railway Company. There was in each of these instructions an improper allusion to the contract above referred to, but, notwithstanding that fact, neither of them imposed upon the conductor and servants of the street railroad company any higher degree of diligence, or the exercise of greater care to prevent a collision at the street crossing, than they were charged with and required to exercise by the law and under the simple averments of the declaration, in order to prevent injury to the passengers of the company. The concluding and salient part of the first of these instructions,

is: "And if you believe, from the evidence, etc., and that the servants of said company were guilty of negligence, as charged by the plaintiff, in his said declaration, and as a result of such negligence, if any, the street car was struck and the plaintiff injured while he was in the exercise of ordinary care for his own safety, you will find the defendant, the West Chicago Street Railroad Company guilty." And the concluding and important part of the other of the instructions is as follows: "It was the duty of the conductor or other employee of the street railroad company to exercise all reasonable precautions to ascertain, himself, before attempting to go over the crossing with a street car, whether an engine or train of the railway was approaching Madison street in either direction." Would the duty without the contract have been less than it is stated to be with it, in these instructions? Certainly not. Our conclusion is, that while these instructions should have been refused or modified, and for the same reason that the agreement should have been excluded, yet that giving them was not substantial and reversible error, since they could not have misled the jury.

The court also gave, at the instance of the defendant railway company, an instruction to the effect that if the jury believed, from the evidence, "that the plaintiff, for a reward, became a passenger of said street car and was injured while being carried, such injury raises a presumption of negligence on the part of the defendant, the West Chicago Street Railroad Company, and to rebut such presumption, and to prevent a recovery against it, said defendant must show affirmatively that it was free from any negligence charged in the declaration contributing to such injury, if it shall appear from the evidence that the plaintiff was, before and at the time of his injury, exercising ordinary care for his own safety."

As we understand counsel, it is conceded that the instruction announces a correct proposition of law, that would have been applicable to the case if only the declaration had been general instead of special. Counsel say: "The plaintiff does not, in his declaration, proceed upon the theory that he became a passenger of the defendant; that a collision occurred with the train of the defendant, the Chicago and Northwestern Railway Company, and that thereby a presumption of negligence arose which cast the burden of proof on this defendant. That he might have done so, we concede. But when a plaintiff, as in this case,

specifies the negligence of the defendant, his recovery will be limited thereto."

On the trial of an action against a railroad company by a passenger for an injury received through a collision of trains, a *prima facie* presumption of negligence arises against the carrier company. *North Chicago Street R. R. Co. v. Cotton*, 140 Ill. 486, 9 Am. Neg. Cas. 249n; *Hutchinson on Carriers*, § 800; *Skinner v. Railway Co.*, 5 Exch. 787 (1); *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418, 6 Am. Neg. Cas. 176. In *Central Passenger Co. v. Kuhn*, and *Louisville and Nashville R. R. Co. v. Kuhn*, 86 Ky. 578, and 32 Am. and Eng. Ry. Cas. 16, the plaintiff was a passenger on a street car, which, while passing a railroad crossing at night, was run into by a train and the plaintiff injured, and it was held that the burden of proof was on the street car company to show, if such was the case, that the injury did not result from its want of diligence, but from the negligence of the railroad company, and that the burden was on the plaintiff to prove negligence on the part of the railroad company, if he desired to recover from each. (See, also, *Pittsburg, Cincinnati and St. Louis Railway Co. v. Thompson*, 56 Ill. 138, 9 Am. Neg. Cas. 221). Plaintiff did not proceed in his case upon the theory of presumptive negligence. He charged in his declaration specific acts of negligence against both defendants, and introduced evidence tending to prove his charges.

In view of the declaration on which the case was tried, the instruction now under examination should not have been given. But there are several considerations that lead us very clearly to the conclusion that the judgment should not be reversed, under the circumstances of the case and of the trial, because it was given. The jury were told, in the instructions of the court, that the burthen was upon the plaintiff to prove his case by a preponderance of proof; that if the evidence was evenly balanced they must find the defendant not guilty, and that the plaintiff must

1. In *Skinner v. London, Brighton & South Coast R'y Co.*, 5 Exch. 787, the declaration alleged that the plaintiff was a passenger in a train operated by defendant, and that, in consequence of the carelessness, negligence and want of skill of the company and their servants, the train ran against another train on the line, whereby he was injured.

At the trial it appeared that the accident was occasioned by the train running, in the dark, against another train which was standing still at an intermediate station on the line. *Held*, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the company.

prove his case, as alleged in the declaration, by a preponderance of evidence. Besides this, the Appellate Court say in their opinion, filed in the case: "We think that the evidence tended so strongly to show a neglect on the part of the appellant to use the high degree of diligence its obligations to appellee demanded, that had there been a verdict for appellant it would have been the duty of the trial court to have set the same aside;" and further they say, that they disregard whatever error there was in giving instructions, because of the facts clearly proven in the case, and affirm the judgment. The decision of the Appellate Court being final and conclusive in respect to the fact of the alleged negligence of appellant, we think that their judgment, which, while it conceded error in the instructions, nevertheless affirmed plaintiff's case because of the firm foundation of fact upon which it stood, is entitled to great weight upon this appeal. And besides this, plaintiff did not ask for this objectionable instruction. It was requested by appellant's co-defendant. It must be admitted that appellant had a right to object to the instruction and except to the action of the court in giving it. It stated a correct rule of law, but not applicable to the case made by the pleadings of the plaintiff. Under the circumstances, the instruction not being moved for by plaintiff, it was the duty of appellant to have made his objection specific, and to have excepted to it on the ground it submitted to the jury a case not made by the declaration. The objection to the instruction, in substance, amounts to a claim of variance. The defect was curable, and had plaintiff's attention been called to the matter by a specific objection or exception, he could readily have amended one of the counts of his declaration by striking out the special matter alleged therein. Appellant not having afforded him an opportunity to do this, must be considered as having waived the objection that it now seeks to avail of.

We find no error in the record for which the judgment of the Superior Court of Cook county should be reversed. The judgment of the Appellate Court is, therefore, affirmed.

Judgment affirmed.

CENTRAL RAILWAY COMPANY v. ALLMON.

Supreme Court, Illinois, October Term, 1893.

[Reported in 147 Ill. 471.]

COLLISION BETWEEN WAGON AND STREET CAR — RATE OF SPEED OF STREET CAR — SCHEDULE TIME OF TRIP — EXCESSIVE SPEED — EVIDENCE. — In an action to recover damages for injuries to a boy, caused by a collision between the buggy in which he was riding and one of defendant's street cars, where plaintiff introduced evidence of the schedule time of the street car's trip, with other evidence as to the rate of speed at which the car was going, to prove that the car was going at an excessive rate of speed at the time of the accident, it was held that such evidence, while not conclusive as to the average rate of speed, was admissible as tending to prove such average rate, and as a basis of comparison with the rate of speed at which the car was going at the time of the collision.

WITNESS — IMPEACHING TESTIMONY. — A witness may be asked on cross-examination if he has not theretofore given a different account of the matter of fact to which he has testified, in order to lay a foundation for impeaching his testimony by contradicting him; and questions addressed to him for such purpose should be directed to matters of fact only, and not to mere opinions which he has formerly expressed.

APPEAL from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Peoria county. The facts appear in the opinion. *Judgment affirmed.*

STEVENS & HORTON and KEEP & LOWDEN, for appellant.

WORTHINGTON, PAGE & BRADY, for appellee.

Magruder, J. — This is an action brought by the appellee, who is a minor, by his next friend, against the appellant company, to recover damages for a personal injury. The appellant operates a street-railway line, propelled by electricity, in the city of Peoria. On February 15, 1891, which was Sunday, the appellee, a boy about sixteen years old, was riding with two other lads in a buggy on Adams street in that city, when the buggy came in collision with one of the company's cars, causing the injury complained of. The declaration charges negligence against the defendant, in operating its car at an excessive rate of speed, and in failing to take notice of the buggy while on the track, by reason of the shying of the frightened horse, and to stop the car in time to avoid the collision. Verdict and judgment in the Circuit Court were in favor of the plaintiff. The judgment of the Circuit Court has been affirmed by the Appellate Court, and the present appeal is prosecuted from such judgment

of affirmance. All the facts are settled by the judgment of the appellate court. No complaint is made of any instruction given, or of any instruction refused. The objections insisted upon relate to the admission of testimony, and to the remarks of counsel before the jury.

1. It is contended that the court erred in permitting the plaintiff, over the objection of the defendant, to introduce evidence of the distance of the round trip on Adams street, and of the schedule time for making that trip. It appeared that the distance of a round trip was about ten miles, and that the schedule time for making such trips, exclusive of stops at each end of the line, was one hour. We see no objection to the testimony, when taken in connection with other testimony introduced as to the rate of speed. The charge was that the car was traveling at an excessive rate of speed. If the time, as fixed by the company in the schedule adopted by it, was one hour for making the round trip, then this proof tended to establish the average rate of speed as being at the rate of ten miles an hour. This was not an accurate criterion of the rate, because it was impossible to tell the exact number of stops that would be made between the ends of the line. The proof shows that such stops might be more numerous on one trip than another, and on Sunday than on any other day of the week. But, while proof of one hour as the schedule time for making a trip of ten miles may not have been conclusive evidence that the average rate was ten miles an hour, yet it was admissible as tending to prove such average rate. *C., B. & Q. R. Co. v. George*, 19 Ill. 510 (1). Other testimony was introduced by the plaintiff, some of which was to the effect that the car which collided with the buggy was, at the time of the collision, going at the rate of fifteen miles per hour; some of which showed that it was going at the rate of from fifteen to twenty miles an hour; and some of which fixed the rate at from twenty to twenty-five miles an hour. It was for the jury, looking at all the evidence, to say whether the motorman in charge of the car which collided with the buggy was unnecessarily drawing the car at an excessive rate of speed, or whether the company had, by its schedule, fixed such a short time for making the round trip that the motorman was obliged to go at an excessively rapid rate in order to make all the required stops and pass over the length of the line within the prescribed time. It often happens that a

1. See the *George* case, page 355, *ante*.

case must be established by a number of facts, any one of which, by itself, would be of little weight, but all of which, taken together, would prove the issue. Evidence which, standing alone, may not be sufficient to make out a case, may aid in doing so. Testimony not necessarily relevant should not be excluded, where its relevancy may be made to appear by proof *aliunde*. The question is whether the offered proof tends to support the defense or the cause of action. All evidence tending to prove either of the material facts is admissible, although it may not alone establish the whole case. *Bedell v. Janney*, 4 Gilman, 193; *Rogers v. Brent*, 5 Gilman, 573; *Slack v. McLagan*, 15 Ill. 242; *Hough v. Cook*, 69 Ill. 581; *City of Chicago v. Dalle*, 115 Ill. 386. Counsel for appellant invokes the rule that acts of negligence committed by the defendant at other times cannot be shown in order to prove negligence at the time of the accident. For example, where the negligence charged is failure to ring a bell or sound a whistle when a railroad train is approaching a crossing with unusual speed, it is held that proof of previous failure to give such signals when passing the crossing is inadmissible. *C., B. & Q. R. Co. v. Lee*, 60 Ill. 501; *P. & P. U. R. Co. v. Clayberg*, 107 Ill. 644. This rule is undoubtedly a correct one. But proof of the schedule time fixed by the defendant for the passage of its cars over a specified distance was not introduced for the purpose of showing that the defendant had been propelling its cars at an excessive rate of speed on other trips than the one in question, but for the purpose of showing the average rate of speed, as a basis of comparison with the rate of speed at which the car colliding with the buggy was traveling. If the average rate of speed fixed by the schedule of the company was excessive, in the view of the stops necessary to be made on the route, then the company would be responsible for an accident which occurred because one of the servants was speeding the car in conformity with its own schedule.

2. It is claimed that the court erred in permitting the witness Daniel Allmon to testify, over the objection of the defendant, that his brother, the plaintiff, could not have jumped from the buggy, and avoided the injuries complained of. It appears from the evidence that plaintiff was sitting in the buggy between his brother Daniel, on the one side, and the young man Grundenburg, on the other. The top of the buggy was raised. Daniel was driving. The horse became frightened at the approaching

car, and reared and plunged forward upon the car track. Grundenburg reached forward, and took hold of the reins, in order, if possible, to assist Daniel in controlling the horse, and in turning him off the track and away from the approaching car. It is manifest that the plaintiff, being in the middle, between his brother and Grundenburg, was completely hemmed in by the outstretchd arms of his companions, holding the reins on each side of him. The car was only a few feet distant, and was rapidly approaching upon a grade standing down towards the buggy. This condition of things being disclosed by the evidence, Daniel, when on the stand as a witness, was asked whether or not his brother, the plaintiff, "could have gotten out of the buggy at any time from the time the horse commenced to plunge and rear until the car struck the horse?" The question was objected to as calling for an opinion, but the objection was overruled, and the defendant excepted. The witness then answered, "He could not." It was most certainly true that the plaintiff could not have escaped from the buggy, under the circumstances, without jumping over the extended arms which encircled him, or leaping over the dashboard in front of him, or plunging through the rear of the buggy. But it is said that the witness should have been called upon to state the position of the parties, and all the circumstances and facts of the situation, and that then it should have been left to the jury to draw the conclusion whether the plaintiff could or could not have alighted from the buggy. It is a general rule that a witness must testify to facts, and not to opinions, and it may be admitted that the statement of the witness in this case was technically inadmissible; but it could not have done the defendant any harm, because the witness stated the facts upon which his conclusion was based, and that conclusion was one which the jury must necessarily have drawn from such facts if he had not announced it. Where the inference to be drawn from a given state of facts is not clear or certain, a jury in whose hearing the facts are recited may be influenced by the opinion of a witness who tells them his conclusion therefrom. It is otherwise, however, where only one conclusion, and that an obvious and necessary one, suggests itself as soon as the facts are presented. When the proof showing the situation and surroundings of the plaintiff and his companions, as the same have been above set forth, was introduced, and heard by the jury, the impossibility of getting out of the buggy in safety was apparent

at once. Nor could it have been made any more apparent by what the witness said about it. The facts detailed by him so plainly involved the conclusion announced by him that his opinion amounted to nothing more than a description of the situation which he saw, and of which he was a part. *Spear v. Richardson*, 34 N. H. 428; 1 Whart. Ev. 509-513, and notes; 7 Amer. and Eng. Enc. Law, pp. 492, 493, and notes.

3. It is assigned as error that the plaintiff was permitted to offer improper evidence for the purpose of impeaching the witness Barnhouse. Barnhouse was the motorman or conductor who had charge of the car at the time of the accident, and testified for the defendant as to the incidents before, after and at the time of the injury to the plaintiff. He testified upon his direct examination as follows: "What, if anything, did you do to check the speed of that car when you saw the horse jumping? Ans. I applied the brake. Ques. How soon after you noticed the horse jumping did you apply the brake? Ans. Instantly, as quick as I could possibly set the brake. * * * Ques. What, if anything, it was possible for you to do, you did not do, to stop that car, as soon as you saw the horse was frightened? Ans. There was nothing." Upon cross-examination by the plaintiff, the witness admitted that, on the day or the next day after the accident, he called at the house of Mr. Allmon, and there had a conversation, at which Patrick Powell, Katie Allmon and Mary Allmon were present. It is admitted that the attention of the witness was properly called to the time and place of this interview. *Quincy Horse Railway Co. v. Gnuse*, 137 Ill. 264. He was asked upon his cross-examination as to the said conversation the following questions, and made the following answers: "Ques. I will ask you if Mr. Powell did not say to you, in substance, 'Somebody must be to blame,' and if you did not answer, in substance, 'The fact of the matter is that I neglected my own business, and forgot to put the brake on my car.' (Objected to, etc.) Ans. No, sir. * * * Ques. I will ask you if, in that same conversation, Miss Katie Allmon did not say to you, in substance, 'Well, you could have stopped the car,' and if you did not answer, in substance, 'Yes, if I had not lost my head.' Ans. No, sir; I did not." In rebuttal the plaintiff proved by Powell and Katie Allmon that Barnhouse did say in that conversation what he denied having said as above set forth. This rebutting evidence was expressly limited by the court to the purpose of the

impeachment of the witness Barnhouse. If we understand counsel for appellant, they make two points. In the first place, they say that the questions put to the witness on cross-examination were collateral or irrelevant to the issue, and that, therefore, the answers cannot be contradicted by the plaintiff, but must be taken as conclusive against him. The rule is that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence. 1 Greenl. Ev., § 449. But we think that the questions here addressed to the witness on cross-examination were proper, in view of what had been said on the direct examination. They did not call for matters which were collateral or irrelevant to the issue. One of the charges of negligence in the declaration was that defendant's servant did not stop the car in time to avoid the collision. After the conductor had stated on his direct examination that he applied the brake as quickly as he could, and did all that he could do to stop the car, it was certainly legitimate cross-examination to ask him if he had not, on a previous occasion, stated that he forgot to put on the brake, and that he could have stopped the car if he had not lost his head. A witness may be asked on cross-examination if he has not theretofore given a different account of the matter of fact to which he has testified, in order to lay a foundation for impeaching his testimony by contradicting him. 1 Greenl. Ev., § 449. The second point is that the questions put to the witness on cross-examination called for a former opinion of the witness as to the matter in issue. It is unquestionably true that, if a witness has simply testified to a fact, his previous opinion as to the merits of the cause cannot be regarded as relevant to the issue. Hence the questions addressed to him on cross-examination with a view of laying a foundation for his impeachment should be directed to matters of fact only, and not to mere opinions which he has formerly expressed. The latter are inadmissible unless the case is one where evidence of opinion is material. 2 Tayl. Ev. pt. 1, § 1445; 1 Rice, Ev. 621; 1 Greenl. Ev., § 449; *Elton v. Larkins*, 5 Car. & P. 385 (1); *Holmes v. Anderson*, 18 Barb. 420. There is

1. In *Elton v. Larkins*, 5 Car. & P. 385, it was held that a witness cannot be called to contradict another who denies having made a particular statement, if such statement was not of a fact, but only of a matter of opinion, as such statement of opinion does not come within the rule which confines contradictions to matters directly connected with the issue in the cause.

much force in this point as to a part of the statement made by the witness to which his attention was called by the cross-examination. The objectionable part is contained in these words: "I neglected my own business." But his statement that he neglected his business was coupled with and explained by the further statement that he forgot to put on the brake. When he said that he forgot to put on the brake, he stated a fact. It will thus be seen that the question was directed to a matter of mixed opinion and fact. No objection was made by the defendant to that portion of the question which had reference to the matter of opinion. The objection was directed to the question as a whole, and upon other grounds than that it called for a previous statement of opinion. The defendant not only made no objection to the objectionable part of the question, as referring to an expression of opinion, but asked for no instruction limiting the attention of the jury to the portion calling for a statement of fact. Under these circumstances, we do not regard the reference of the witness to his neglect of his business as constituting error sufficient to justify a reversal. Where, for the purpose of laying the foundation for an impeachment, the attention of a hostile witness is directed on cross-examination to a previous account given by him of the transaction testified to on the direct examination, and in such previous account he appears to have mingled his statement of a fact with an expression of his own opinion in reference to the character or quality of that fact, an objection that the previous account referred to contains matter of opinion as well as matter of fact should be specifically pointed out at the time the question is asked, so that the interrogatory may be so changed as to refer to the matter of fact only. *Chic. W. Div. R. Co. v. Ingraham*, 131 Ill. 669. If the matters of opinion and fact are so intimately blended in the previous account as not to be easily susceptible of separation, the objecting party can have the former excluded from the consideration of the jury by asking proper instructions to that effect. *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481.

4. It is said that counsel for plaintiff was allowed to make improper use of the evidence in his argument before the jury; that is to say, it is claimed that the evidence introduced for the purpose of impeaching Barnhouse was made use of in the argument for the purpose of showing that the company was guilty of negligence. When counsel for defendant objected to the remarks

of counsel for plaintiff, the latter disclaimed any intention of referring to the testimony in question for any other purpose than that of showing that the witness was contradicted. After an examination of the language used, as it is set out in the record, we cannot see that it can be construed as bearing upon any other subject than the impeachment of the conductor. Where, on a trial for murder, the state's attorney commented on testimony introduced to impeach a witness for defendant, and referred to it as showing a reason for defendant's presence near the scene of the crime, but, upon defendant excepting to such reference, he stated to the jury that he called attention to it for the sole purpose of impeaching the witness, it was held on appeal that such reference did not seriously affect defendant's rights. *Cook v. State*, 30 Tex. App. 607.

The judgment of the Appellate Court is affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY v. LARSON.

Supreme Court, Illinois, October Term, 1894.

[Reported in 152 Ill. 326.]

CONSTITUTIONAL LAW — JURISDICTION OF APPELLATE AND SUPREME COURTS. — The legislature has authority, under the Constitution, to make the decisions of the Appellate Courts final merely as to questions of fact, and to confer upon the Supreme Court jurisdiction to review questions of law only.

PRACTICE — EVIDENCE — QUESTION OF LAW — REVIEWAL. — Motions to instruct the jury to find for the defendant, or to exclude the evidence introduced by the plaintiff, operate as demurrers to the evidence, and raise questions of law, and such questions the Supreme Court has jurisdiction to review in all cases that come before it; but where, as in this action, defendant did not demur to the evidence, or move to exclude it, or request an instruction in its favor, and the case went to the jury on the facts, no question of law is preserved upon the facts for the Supreme Court to review. *Distinguishing* *Abend v. Terre Haute & Ind. R. R. Co.*, 111 Ill. 202; *Holmes v. Chicago & Alton R. R. Co.*, 94 Ill. 439. and *Chicago & N. W. R'y Co. v. Scates*, 90 Ill. 586, 2 Am. Neg. Cas. 623 (1).

INSTRUCTION — ABSTRACT PROPOSITION OF LAW. — While an instruction which states an abstract proposition of law may be refused on that ground, it is not reversible error.

RIGHT OF WAY AT CROSSING — DUTY OF RAILROAD COMPANY. — A railroad company has the superior right of way over a public crossing.

1. The Abend case is reported with the Illinois cases, in this volume, *post*.

but it is bound to use ordinary and reasonable care to avoid accidents while crossing over a public highway.

NEGLIGENCE — WHEN QUESTION OF LAW AND WHEN OF FACT. — It is only when the conclusion of negligence necessarily results from the statement of fact, that the court can be called upon to say to the jury that a fact establishes negligence as a matter of law. If the conclusion of negligence, under the facts stated, may or may not result, as shall depend on other circumstances, the question is one of fact for the jury. *Chicago & Eastern Ill. R. R. Co. v. O'Connor*, 119 Ill. 566.

INSTRUCTIONS — MODIFICATION — EVIDENCE. — Where defendant tendered two instructions the effect of each of which was that if plaintiff's team became frightened by ringing of bell or sounding of whistle of engine when passing over the crossing, then defendant was not responsible for the result of such fright, and the court modified such instructions by striking out the words "or sounding of the whistle," there was no error in such modification, the declaration not charging that the whistle sounded nor was there any evidence to prove that it did sound.

APPEAL from the Appellate Court for the Second District, heard in that court on appeal from the Circuit Court of Kankakee county. The facts appear in the opinion. *Judgment affirmed.*

G. S. & E. ELDREDGE, JAMES FENTRESS and HARRISON LORING, for appellant.

H. K. WHEELER, for appellee.

Baker, J. — In this action on the case by appellee, a minor, who sues by his next friend, against appellant, for personal injuries, he recovered a judgment in the Kankakee Circuit Court of \$2,500 damages; and that judgment was affirmed in the Appellate Court of the Second District.

The injuries were received by appellee from the running away of his team of horses, attached to a wagon loaded with slag, while attempting to cross the railroad tracks of appellant at Sixty-seventh street, in the city of Chicago. There were six railway tracks there, and in the center of the street a planked crossing, sixteen feet wide, for the public to use in passing over said tracks. Appellee was coming from the east, and approaching the second track from the west, known as "Track No. 2." A suburban train, consisting of an engine and four cars, had just arrived at the Sixty-seventh street depot, from the north, and the rear end of the rear platform of the rear car of the train, as it then stood, projected over the crossing the width of the platform, which was about four feet, leaving a space of twelve feet of planked crossing; and over this the team in advance of the one driven by appellee passed in safety while the train stood still.

The train was headed north, and apparently was destined for some point further north. Appellee was about to follow the team that had crossed the track, when one of appellant's servants on the train stopped him. About the same time the train got under motion, going backward. At that time the horses' heads were across the rails of the railway track. In the meantime a freight train had come up from the south, on another track, in the rear of appellee. He therefore turned his horses around as quickly as possible towards the north, so that their heads would then clear the rear end of the train. The servants of appellant, seeing the predicament appellee was in with his team, stopped the train, but only momentarily. The train had moved part of the length of the rear car, but that car had not cleared the crossing. When the conductor saw that the train cleared the team, he again proceeded to back the train, as he had first started to do. The train immediately commenced to back up again, and continued to do so until all the cars and locomotive had passed, although they were so close to the horses' heads that they almost struck them. In the meantime the noise and proximity of the moving train, ringing bell, and escaping steam, and the smoke from the engine, frightened the horses, and they began jumping and behaving badly, and as soon as the locomotive cleared the crossing they turned their heads, went across the tracks, and ran away. Appellee was thrown from the wagon, and severely injured; his thigh bone was fractured, and his head so hurt as to cause concussion of the brain and impairment of memory, from which he has never recovered, so that he has never been able to give any account of the accident.

In their argument in this court counsel for appellant have discussed at considerable length the evidence in the case; their claims being that, at the time of the accident, appellee was not in the exercise of ordinary and reasonable care, and that there was no culpable negligence on the part of appellant. It is insisted that this court should review the evidence for the purpose of ascertaining and determining for itself the facts of the case, and it is strenuously urged that the legislature of the State have no constitutional authority to say and determine what questions involved in cases coming before this court on appeal from the Appellate Court may be considered and passed upon here, and what questions shall not be so considered and determined. This is not an open question. In *C. & A. R. R. Co. v. Fisher*,

141 Ill. 614, this court expressly held that under the Constitution the Legislature has the power to confer upon this court jurisdiction to review the judgments of the appellate courts, both upon questions of law or questions of fact, or to make the decision of the appellate courts final both as to law and as to fact, and that hence it follows that the legislature has authority to make the decisions of the appellate courts final merely as to questions of fact, and to confer upon the Supreme Court jurisdiction to review upon questions of law only. It would be useless to recapitulate the grounds upon which that decision was based, and especially so as it merely followed in the wake of the earlier decisions in *Young v. Stearns*, 91 Ill. 221, and *Fleischman v. Walker*, Id. 318. See also *L. S. & M. S. Ry. Co. v. Richards*, 152 Ill. 59.

It is further claimed that this court, by its decisions in *Abend v. T. H. & Ind. R. R. Co.*, 111 Ill. 202; *Holmes v. C. & A. R. R. Co.*, 94 Ill. 439, and *C. & N. W. Ry. Co. v. Scates*, 90 Ill. 586, 2 Am. Neg. Cas. 623, all of which were decided after sections 87 and 89 of the practice act went in force, on July 1, 1877 (Laws 1877, p. 148), and more especially by the decision in the first-named case, has established it as the law of this State that the Supreme Court will, in all cases of appeals from or writs of error to the appellate courts, look into the evidence to see if a liability has been established against the defendant by the evidence introduced. It seems to us that counsel have not examined those cases with sufficient care. On the trial of the *Abend Case*, after the evidence on the part of the plaintiff was all in, the defendant declined to offer any testimony; and the court, at its instance, instructed the jury to find the issues for the defendant, which it did (1). Motions to instruct the jury to find for the defendant, or to exclude the evidence introduced by the plaintiff, operate as demurrers to the evidence, and raise questions of law, and such questions this court has jurisdiction to review in all cases that come before it. (*Cothran v. Ellis*, 125 Ill. 496; *Joliet, Aurora & Northern R. R. Co. v. Velie*, 140 Ill. 59.) And so what was said by this court in the *Holmes Case* was said in discussing the matters of involuntary nonsuits, and motions to exclude the evidence of parties plaintiff from the jury. And what was said in the *Scates Case* was said in discussing the rulings

1. The *Abend case* is reported with the Illinois cases, in this volume, *post*.

of the court upon the instructions. In the case at bar the defendant did not, when the plaintiff rested his case, either demur to the evidence, or move to exclude it, or request that the jury be instructed to find in its favor, but introduced testimony of its own to contradict the case made by the plaintiff, and afterwards, when the testimony was all in, it did not move to exclude it or to instruct the jury to return a verdict for the defendant, but went to the jury with the case, and asked that the jury should be instructed to pass upon the issues of fact, and determine them in accordance with the preponderance of the evidence.

It is claimed that the first, second and fourth instructions for appellee were erroneous, because they each commenced with some such formula as this: "The jury are instructed, for the plaintiff," etc., and *Aneals v. People*, 134 Ill. 401, is cited in that behalf. While it is true that in that case the practice of marking instructions for the one side or the other was condemned, yet it was held that the mere fact of such marking was not error.

It is objected that the court gave, at the instance of the plaintiff, an instruction that read as follows:

"For the plaintiff you are instructed that while the railroad company has the right of way over and across the public streets, still that does not give it the right to be negligent in backing up a train across a public crossing."

The instruction states an abstract proposition of law, and might have been properly refused on that ground; but at the same time it states the law correctly. It was given in connection with this further instruction:

"The court instructs the jury that it was not the duty of the defendant to stop its trains or train in question so as to permit the plaintiff to pass over the crossing in question before such train passed the crossing, and this rule applies in backing up its trains as well as running such trains ahead, provided in starting to back such train it used reasonable care to avoid injury to others."

The two instructions, taken together or separately, plainly indicated to the jury that the railroad company had the superior right of way over the public crossing, but that such right did not give it the privilege of being negligent in backing its trains over the same — in other words, that it was bound to use ordinary and reasonable care to avoid accidents while crossing over a public highway.

It is objected that the instruction first quoted assumes that the defendant was absolutely guilty of negligence in backing its trains. We do not so understand it, and do not think that the jury would so understand it, and especially so since they were also told that the same rule applied whether the trains were running ahead or backing up; and we may reasonably presume, in favor of the action of the court in the premises, and from the form the second of said instructions was in when tendered by appellant to the court, and the amendment made thereto by the court, that it was urged before the jury at the trial that the railroad company had the superior right at the crossing and that the traveling public must look out for themselves. We are unable to say that there was manifest error in giving the instruction to which exception is taken.

As we understand counsel, the objection taken to the fourth instruction for appellee is that the hypothetical case stated therein is not the case stated in either of the counts of the declaration. We see no substantial variance between the cause of action alleged in the fifth count and the case set out in the instruction. The count states the cause of action in a general way. It is not necessary that it should aver all the specific facts and circumstances tending to show negligence. That would be pleading the evidence. The instruction goes more into detail in respect to the *res gestæ* of the accident. There was sufficient evidence in the record to base it upon. We think there was no error in giving it.

It was not error to modify the first instruction asked by appellant, by adding thereto the words, "provided in starting to back such train it used reasonable care to avoid injury to others." The instruction, with the amendment made by the court, has already, in another connection, been set out herein. Without the modification it would likely have misled the jury into believing that on account of the superior right of appellant in respect to the railway crossing, it, appellant, owed no duty to appellee or to other persons passing along the public highway and over and across the railway tracks.

The court refused to give three of the instructions submitted by appellant. Each of these instructions was to the effect that if the jury believed, from the evidence, certain specified facts and circumstances, then the plaintiff was guilty of "gross negligence" or "negligence." In Chicago & Eastern Ill. R. R. Co.

v. O'Connor, 119 Ill. 586, it was said: "It is only when the conclusion of negligence necessarily results from the statement of fact, that the court can be called upon to say to the jury that a fact establishes negligence as a matter of law. If the conclusion of negligence, under the facts stated, may or may not result, as shall depend on other circumstances, the question is one of fact for the jury." And in *Chicago, Milw. & St. Paul Railway Co. v. Wilson*, 133 Ill. 55, we held that it cannot usually be laid down as a rule of law that in any given case certain specific acts are essential to the exercise of ordinary care, or that the absence of such acts is negligence. Under these decisions, and others of like import, it was not error to refuse said instructions.

Appellant tendered two instructions, the substance of each was that if the jury believed from the evidence that the team in question became frightened by the ringing of the bell or sounding of the whistle of the engine when passing or about to pass over the crossing, then the defendant was not responsible for the result of such fright. The court modified these instructions by striking out the words "or sounding of the whistle." It was not charged in the declaration that the whistle sounded, or that the horses were frightened by the whistle or the sounding of the whistle. Nor was there any evidence proving or tending to prove that the whistle did sound. Instructions should always be based on the evidence in the case. There was no error in making these modifications.

We find no substantial error in the record. The judgment of the appellate court is affirmed.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY *v.* ODUM (1).

Supreme Court, Illinois, April Term, 1895.

[Reported in 156 Ill. 78.]

COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — INSTRUCTION — OMISSION — SUBSEQUENT INSTRUCTION. — An instruction to the effect that if defendant's engineer or fireman could, by the exercise of reasonable care and watchfulness, have seen plaintiff's team after it was on the track in time to have stopped the engine without danger to the train, defendant was liable, though technically incorrect in omitting the qualification "before the collision," was cured by a subsequent instruction which

1. Affirming same case, 52 Ill. App. 519.

fully and plainly stated the principle attempted to be laid down, and such instruction was not misleading.

INSTRUCTION — RIGHT OF RECOVERY — WHEN ERROR CURED. —

An instruction that "if the jury believe from any omission to give the signal the plaintiff was lulled into a feeling of security in attempting to cross the railroad" was erroneous, as unless the accident resulted from the omission to give the signal a recovery could not be had, the fact that plaintiff may have been lulled into a feeling of security being of no moment. But while the instruction did not state the law correctly it is not ground for reversal where subsequent instructions state the law clearly.

INSTRUCTION — NEGLIGENCE — LANGUAGE CONSTRUED. —

An instruction that if plaintiff was free from negligence, and defendant's servants were guilty of negligence, either in running over the crossing at a greater rate of speed than was usual, and was reasonably safe for persons about to go across the track, or in not ringing the bell or sounding the whistle, as required, and that by reason of such negligence plaintiff and his property was injured, then the verdict should be for plaintiff, was not objectionable on the ground that it instructed the jury that "running a train over a crossing at a greater rate of speed than usual" is negligence, as such statement coupled with the words "and was reasonably safe for persons about to go across the track," could not have misled the jury.

APPEAL from the Appellate Court for the Fourth District; heard in that court on appeal from the Circuit Court of Williamson county. The facts appear in the opinion. *Judgment affirmed.*

CLEMENS & WARDER, for appellant.

YOUNG & BAKER, for appellee.

Craig, J. — This was an action brought by James A. Odum against the St. Louis, Alton and Terre Haute Railroad Company, to recover damages for an injury received while crossing defendant's track in a public highway near Marion, in Williamson county, on the sixth day of October, 1892. The declaration contained two counts. In the first count the defendant is charged with negligence in running its trains at a high and dangerous rate of speed. In the second count the defendant is charged with negligence in running its train at a high and dangerous rate of speed, and in failing to ring a bell and sound a whistle continuously for a distance of eighty rods before reaching the crossing. On a trial before a jury the plaintiff recovered a judgment for \$2,000, which, on appeal, was affirmed in the appellate court.

The appellate court, in speaking of the facts at the time of the accident, and the care exercised by the plaintiff and the negligence of the defendant, said: "The plaintiff was riding in a wagon drawn by a yoke of oxen, along the public highway,

towards the town of Marion, and while in the act of crossing defendant's track at a point about 150 yards outside of the corporate limits of Marion, and where said highway crossed the track, defendant's train, consisting of an engine and caboose, coming down the track from the north, struck the wagon about the center, and plaintiff was thereby thrown some distance, and fell upon the ground and sustained serious injuries. A careful examination of the evidence in the record satisfies us the jury were fully warranted in finding defendant guilty of the negligence charged in the second count of the declaration; that such negligence caused the accident and injury to plaintiff; that he was in the exercise of reasonable care for his personal safety when approaching and attempting to cross the track of defendant's road at the time he was injured, and that the damages assessed were not excessive."

It will not be necessary to allude to the facts established by the evidence, except so far as may be necessary to obtain a correct understanding of the instructions, as the judgment of the appellate court affirming the judgment of the Circuit Court is conclusive of the facts.

There is but one error complained of during the trial which properly arises in the record for our consideration, and that is the ruling of the court on the instructions to the jury. Under this head it is claimed in the argument that the court erred in giving instructions Nos. 4, 5 and 7 for the plaintiff. No. 4 was as follows:

"If the jury believe the engineer or fireman could, by the exercise of reasonable care and watchfulness, have seen the plaintiff's team, after it was on the track, in time to have stopped the engine without danger to the train, then the defendant is liable for want of care and watchfulness, provided the plaintiff was at the time exercising reasonable care."

It is apparent that this instruction is technically incorrect. If the engineer, by the exercise of proper care, could have seen the team, after it was on the track, in time to stop the engine, *before* the collision, without danger to the train, it was a duty incumbent on him to do so. But it will be observed that the instruction does not contain the qualification, *before the collision*. Whether the train was or could be stopped before it struck plaintiff's wagon was not submitted in the instruction. But while the instruction is inaccurate, the principle attempted to be laid down

in it is so fully and plainly stated in the defendant's seventh instruction that we do not think the jury could be misled by the instruction complained of.

Instruction No. 5 was as follows: "That the giving of four or five blasts of the whistle, or ringing of the bell for less distance than eighty rods, is not a compliance with the law, which requires the whistle or the bell to be sounded continuously for a distance of eighty rods before reaching the crossing; and if the jury believe from any omission to give the signal the plaintiff was lulled into a feeling of security in attempting to cross the railroad, and that he was exercising such care and caution as would have been exercised by a reasonably prudent man, then the verdict should be for the plaintiff, and damages should be assessed at such sum as the jury think the plaintiff entitled to, from the evidence."

The expression, "if the jury believe from any omission to give the signal the plaintiff was lulled into a feeling of security in attempting to cross the railroad," was condemned by this court in *Peoria, Pekin & Jacksonville R. R. Co. v. Siltman*, 67 Ill. 72, and *Toledo, St. Louis & Kansas City R. R. Co. v. Cline*, 135 Ill. 41. In the last case cited, in discussing a similar instruction, it is said (p. 49): "The first instruction for appellee was inaccurate. The statute imposes a liability upon railway companies for all damages sustained by reason of a neglect to either ring a bell or to sound a steam whistle when approaching places where their railroads cross a public highway. The instruction does not make the liability of defendant for damages depend upon the fact that they were occasioned by a failure to ring a bell or sound a whistle, but dependent upon the fact that such failure lulled the plaintiff into a feeling of security. The plaintiff may have been lulled into a feeling of security by the neglect of defendant in that behalf, *non constat*, such neglect occasioned the injury." But while the instruction does not state the law correctly, two of the defendant's instructions, Nos. 8 and 14, place the question in such a clear light before the jury that we do not see how they could have been misled. No. 8 was as follows: "Though the jury may believe the required signals were not given by the defendant, yet, unless the accident resulted as a consequence of such omission, the plaintiff is not entitled to recover by reason of failure to give the signals." Under this instruction the fact that plaintiff may have been lulled into a feeling of security for

the reason the signals were not given was a matter of no moment. Unless the accident resulted from the omission a recovery could not be had.

Instruction No. 7 was as follows: "If the jury believe the plaintiff was free from negligence, and the defendant's servants were guilty of negligence, either in running over the crossing at a greater rate of speed than was usual and was reasonably safe for persons about to go across the track, or in not ringing the bell or sounding the whistle continuously for a distance of eighty rods, and that by reason of such negligence the plaintiff and his property was injured, then the verdict should be for the plaintiff and his damages assessed at such sum as the jury believe him entitled to from the evidence."

Appellant's counsel make these objections to the instructions: "In the first portion it tells the jury that the running of a train over a crossing at a greater rate of speed than was usual is negligence. Furthermore, it authorizes the jury, in case they find for the appellee, to assess damages at any sum the jury may believe the appellee entitled to." While the instruction, as is evident from its reading, was not carefully prepared, and while it may not be entirely accurate, we do not think it liable to the objections urged against it. The instruction does not purport to tell the jury what is or what is not negligence. On the other hand, the substance of the charge in this regard is: If the jury find from the evidence that defendant's servants were guilty of negligence in running over the crossing at a greater rate of speed than was usual and was safe for persons about to cross the track, and by reason of such negligence plaintiff was injured, then the verdict should be for plaintiff. The use of the word "usual" may be regarded as inaccurate. Outside of incorporated towns and cities the speed of trains has not been regulated by law, and in the absence of a law regulating the speed railroad companies may adopt such rate of speed as they choose, provided the rate of speed adopted does not endanger the safety of passengers or endanger the safety of persons who may have occasion to cross the tracks in the public highways. But the statement, "running over the crossing at a greater rate of speed than was usual," coupled with the words "and was reasonably safe for persons about," etc., could not have misled the jury.

The other objection is not well founded, as, by the terms of the instruction, the jury were required to base their assessment of damages on the evidence.

On the application of the railroad company the court gave to the jury sixteen instructions, in which the law involved in the case was so fully placed before the jury that the errors contained in plaintiff's instructions could not have worked any injury to the appellant.

The judgment of the Appellate Court will be affirmed.

COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — DUTY OF RAILROAD TO GIVE WARNING — CARE REQUIRED OF TRAVELER — CONTRIBUTORY NEGLIGENCE. — In **CHICAGO & ROCK ISLAND R. R. CO. v. STILL**, 19 Ill. 499 (1858), action for damages to team and wagon caused by collision with train at road crossing, judgment for plaintiff was reversed. It was held that "a railroad company should give suitable warning of danger at a common road crossing, so as to prevent injury to others as far as possible; but this duty does not justify a person, at such a crossing, which he must know to be a place of danger, from omitting any proper act of vigilance to avoid a collision. If he should be negligent, he must suffer the consequences, unless the other party has been guilty of misconduct still more gross and wilful than his own. Positive evidence as to the fact that a headlight was burning, or that a bell or whistle was sounding, is entitled to more weight than negative evidence, in relation to such facts. A person crossing a railroad track, who could have seen the cars approach, but turned his back to that direction, and had his ears so bandaged that he could not hear, is guilty of such negligence as will prevent his recovery for injuries, unless he can prove a greater degree of negligence on the part of the railroad company." *Held*, that plaintiff's negligence was greater than that of the railroad company, and he could not recover. On a former trial of the case the jury disagreed. Ruling on the authority of **Galena & Chicago Union R. R. Co. v. Jacobs**, decided at same term. See the Jacob's case, 20 Ill. 478, next paragraph. /

BOY RUN OVER BY TRAIN WHILE CROSSING TRACK — COMPARATIVE NEGLIGENCE. — In **GALENA & CHICAGO UNION R. R. CO. v. JACOBS**, 20 Ill. 478 (1858), action for injuries to plaintiff, a boy, who was run over by defendant's train, while crossing track, judgment for plaintiff for \$2,000 was reversed, on the ground that plaintiff's negligence was greater than that of the railroad company. It was held that "a party should cross a railroad track at the usual crossing. The track is the exclusive property of the company, on which an unauthorized person cannot go

except at his own hazard, unless it be under certain qualifications. To maintain an action for negligence there must be fault on the part of defendant and no want of ordinary care on part of plaintiff. In proportion to the negligence of one party should be measured the degree of care required of the other. Where there are faults on both sides, plaintiff may recover; his fault is to be measured by the negligence of defendant, and the plaintiff need not be wholly without fault. The relative degrees of negligence of the parties may be measured and considered." The court, per BREESE, J., reviewed at length many authorities sustaining the ruling on the degrees of negligence.

The doctrine of comparative negligence is now abrogated in Illinois; see note on the doctrine, in 2 Am. Neg. Cas. 646-647.

BOY RUN OVER ON TRACK — TRESPASSER—ATTEMPTING TO CLIMB ON FREIGHT CAR — RAILROAD COMPANY NOT LIABLE WHEN NOT NEGLIGENT AND EXERCISING DUE CARE. — In CHICAGO, BURLINGTON & QUINCY RAILROAD CO. v. STUMPS, 69 Ill. 409 (1873), an appeal from judgment for plaintiff in action to recover damages for injury to child who was trespassing on train, it was held that a child seven years of age is too young to be charged with negligence. It was also held that a railroad company is not an insurer against every casualty that may happen in a street where it has exercised the highest degree of care for the safety of the citizen, consistent with a reasonable exercise of its franchise. In such action it was also held that where a boy seven years of age runs alongside a train and attempts to climb a ladder on a freight car attached to the train that is running through the streets of a city at the rate of only four miles an hour and is injured by the train running over him and the employees were at their proper places on the train and watchful of their duties, the company is not liable. SCOTT, J., in rendering the opinion of the court, said: "On the first appeal, the judgment in this case was reversed because the verdict was manifestly against the weight of the evidence. The court, in the opinion then delivered, said: 'We can come to no other conclusion, from the whole evidence, than that appellee, at the time of his injury, was attempting to climb upon the ladder of one of the cars of the train in motion, and not of the detached car standing upon the track ahead of the approaching train, and that the railway company are not chargeable with any negligence in running against such a car.' The second trial was had upon substantially the same evidence as the first, with some additional testimony which has relation principally to the questions

whether there was a detached car standing on the track, which caused the injury, or whether it was sustained while appellee was attempting to climb up the ladder on another car when the train was in motion. After the most careful and painstaking consideration of the case, with the additional testimony presented, we cannot avoid the conclusion that the weight of the evidence is against the theory there was a detached car standing on the track, which was the cause of the injury to appellee. There is a conflict in the evidence which may be accounted for in some degree, on the ground that most of appellee's witnesses may have been honestly mistaken as to the fact of having seen a detached car at that point on the morning of the 17th of April. This is possible, so far as they are all concerned, except the two little boys, Henry and Herman Moses. There is no such charitable excuse for the witnesses that testify in behalf of appellant. It is either true there was no detached car on the track that morning, or else five witnesses, four of them men, and the other one old enough to be a bell-boy on the train, are all corruptly untruthful. They state facts about which it is not possible for them to be mistaken. Their testimony is either true or it is wilfully false. The accident occurred on Brown street, between Luke and Walsh streets. The company's road there is a branch track leading to the lumber district on Twenty-second street. At the point where appellee was hurt there was but a single track. All the witnesses for appellant concur in the statement that they had been down to the docks that morning, and returned with the engine alone for the second train they were taking down. It is unusual for any cars to be left standing at that point in Brown street. There was no occasion for leaving a car there. The suggestion of counsel is, it must have become detached by accident, and left standing on the track. This is not possible, if the engine, without cars attached, was brought back over the track a short time previous, as all the witnesses in charge of the work say it was, and no witness states to the contrary. The general rule is that the jury are the judges of the credibility of the witnesses, but in a case like this they ought not to be permitted capriciously to disregard the testimony of five unimpeached witnesses, and rely solely on the testimony of the two little boys, aged respectively seven and eleven years, and which is really all the evidence in the case that cannot consistently be reconciled, simply because they desired to find a verdict in accordance with their testimony. On this branch of the case we said all that was deemed necessary in our former opinion and need not restate our views. *Chicago, B. & Q. R. R. Co. v. Stumps*, 55 Ill. 365, and cases cited. The proof shows appellee was

only seven years of age when he sustained the injuries. He was too young to be charged with negligence, and could be held to no care other than such as a child of that age could be expected to exercise for its personal safety. The principal question in the case, therefore, is, whether the employees of the company were guilty of culpable negligence in the management of the train. It is admitted, if the accident happened to appellee while attempting to climb upon the train when in motion, he cannot recover. What proof is there of negligence on the part of the employees in charge, or of the company itself, in running the train, that contributed to the injury to appellee? We need not repeat what we have said in numerous cases, that a railroad company is to be held to the exercise of a very high degree of care in operating its road through the public streets of a city. Such companies will not be permitted to omit, with impunity, any reasonable duty that may tend to the safety of the public, who have an equal right with themselves to the free use of these thoroughfares. But if there is no negligence or wilful misconduct, there can be no liability, no matter how severe the injury inflicted, nor whether the party injured is capable of exercising care for his personal safety. The law has not made the railroad company an insurer against every casualty that may happen in a street or highway, when it has exercised the highest degree of care for the safety of the citizen, consistently with a reasonable exercise of its franchise. The injury in such cases must be attributed to inevitable accident, which no vigilance, however great, could foresee or avoid." * * * The court reviewed the evidence, and held that where the employees were at their proper places on the train, and watchful of their duties, the railroad company was not liable. (See also first appeal in this case, 55 Ill. 365.)

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY v. JOHNSEN.

Supreme Court, Illinois, January Term, 1891.

[Reported in 135 Ill. 641.]

PEDESTRIAN CROSSING TRACK AT STREET CROSSING STRUCK BY TRAIN — DUTY OF RAILROAD COMPANY AT CROSSINGS — FAILURE TO GIVE WARNING OF APPROACH. — In an action to recover damages for injuries to plaintiff, who was struck by defendant's train at a railroad crossing, it appeared that plaintiff, before attempting to cross the track, stopped on the east side of the track, and looked west and south of the track; that on one of the western tracks a passenger train was moving

south; that another train was moving north; that freight cars were moving across the street on the second track west of where he stood; and that, while looking westward, with his face turned a little towards the north, some cars moving south from where he stood struck and injured him, no warning of any kind having been given of the approach of the cars. *Held*, that where railroads cover a public street with a large number of tracks, they must observe unusual care and take extra precautions to avoid injury to persons passing along the street or sidewalks; and that plaintiff had a right to believe that a train of cars would not be allowed to cross the street where he was standing without giving him warning by bell, or whistle, or flagman.

STATUTE REQUIRING SIGNALS ON APPROACHING CROSSINGS CONSTRUCTED. — The statute (Rev. St. Ill., 1889, c. 114, § 68), which requires a bell or whistle to be sounded "at the distance of at least eighty rods" from the crossing, and to be kept ringing or whistling until the crossing is reached, is applicable as well when the cars begin to move within the eighty rods as when the point of starting is fully eighty rods or more than eighty rods distant.

INSTRUCTION — PROSPECTIVE SUFFERING — DAMAGES. — Where the proof as to plaintiff's injuries tends to show that the wound on plaintiff's foot which was not amputated was apt to break out afresh at any time, and was in such a condition that it could not be used, and that the other foot had to be amputated, there was evidence enough to justify the charge allowing the jury to take into consideration "prospective suffering and loss of health."

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook county. The facts appear in the opinion. *Judgment affirmed.*

"This was an action on the case in the Circuit Court of Cook county. The trial resulted in a verdict and judgment in favor of the plaintiff for \$7,500 and for costs.

"The instructions referred to in the opinion of the court are as follows:

"1. The jury are instructed, that if they believe, from the evidence, that the plaintiff, Johnsen, was injured in the manner stated in the declaration, through the fault of the defendant's employees in negligently operating and running cars upon the railroad of the defendant, as alleged in the declaration, and that the plaintiff was exercising due care himself at the time, or if the jury believe, from the evidence, that said plaintiff was exercising ordinary care on his part, but was guilty of slight negligence contributing to such injury, and that the employees of the defendant were guilty of gross negligence contributing to such injury, but that the negligence of said plaintiff was slight and that of defendant's employees was gross when compared with each other,

the plaintiff is entitled to recover, and the verdict should be accordingly.

“ 2. The court instructs the jury, that if they believe, from the evidence, that the plaintiff, while exercising due and proper care under the circumstances, was injured by the negligence of the defendant, as charged in the declaration, then the defendant is liable to the plaintiff in damages for such injuries, and the jury will find for the plaintiff. And the court further instructs the jury, that if they find, from the evidence, that the plaintiff was exercising ordinary care on his part, but was himself guilty of some negligence, but that the defendant was guilty of gross negligence, contributing to such injury, and that the plaintiff's negligence was slight as compared with the negligence of the defendant, still he may be entitled to recover.

“ 3. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury has a right to, and they should, take into consideration all the facts and circumstances in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case, his loss of limb, disfigurement and physical impairment, if any, caused by such injury, if any, his pain and suffering, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence before them in this case, he has sustained or will sustain by reason of such injuries.”

PLINY B. SMITH, for appellant.

JOHN S. MILLER, for appellee.

Magruder, J. — This is an action to recover damages for a personal injury. The trial below resulted in a verdict and judgment for the plaintiff, and an appeal to the Appellate Court has resulted in a judgment of affirmance.

The first error assigned is the refusal of the court to instruct the jury, at the request of the defendant, that the evidence was not sufficient to justify a verdict for the plaintiff, and that their verdict should be for the defendant. We do not think that the facts shown by the testimony of the plaintiff conclusively established negligence on his part as a matter of law. The court can never be called upon to say to a jury that negligence has been established as a matter of law, unless the conduct of the injured party has been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent.

"Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." (C. & E. I. R. R. Co. *v.* O'Connor, 119 Ill. 586; T. H. & I. R. R. Co. *v.* Voelker, 129 Ill. 540.) Unless the negligence of the plaintiff is proven by such conclusive evidence that there can be no difference of opinion as to its existence upon a mere statement of the facts, the jury must pass upon it. We have repeatedly held that it is a question of fact to be determined by the jury from the evidence, and not a question of law, whether an injured party has exercised ordinary care for his safety and to avoid injury (1).

1. The Johnsen case (the case at bar) is cited in the following case:

In *LAKE SHORE & MICHIGAN SOUTHERN R'y Co. v. OUSKA*, Adm'x., 151 Ill. 232 (1894), an action to recover damages for the death of Joseph Ouska, who was killed while crossing the track by a train of defendant, the Supreme Court, in discussing the appeal from judgment for plaintiff, said (per CRAIG, J.): "It is first contended that there was a total failure of evidence to show the observance of due care on the part of the deceased, and the trial court erred in submitting the case to the jury on the instructions. In an action to recover for a personal injury, it is a well-settled principle that no recovery can be had unless the person injured used ordinary care to avoid the injury; but whether the person injured exercised ordinary care to avoid the injury is a question of fact, to be determined from the evidence. The same question arises in *L. S. & M. S. R. Co. v. Johnsen*, 135 Ill. 641, and it is there said: 'The court can never be called upon to say to the jury that negligence has been established as a matter of law, unless the conduct of the injured party has been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent. Negligence cannot be conclusively established by a state of facts upon which fair-minded men will differ. Unless the negligence of the plaintiff is proven by such conclusive evidence

that there can be no difference of opinion as to its existence upon the mere statement of facts, the jury must pass upon it. We have repeatedly held that it is a question of fact, to be determined by the jury, from the evidence, and not a question of law, whether an injured party has exercised ordinary care for his safety and to avoid injury.' See also *Chic. & E. I. R. Co. v. O'Connor*, 119 Ill. 586; *T. H. & I. R. Co. v. Voelker*, 129 Ill. 540; *Penn. Co. v. Frana*, 112 Ill. 398; *C. & I. R. Co. v. Lane*, 130 Ill. 116. It may be conceded that there is some evidence in the record which tends to prove that the deceased did not exercise that care and caution which a reasonably prudent person should have exercised to avoid the injury; but, when all the facts and circumstances are considered and given due weight, we think there was enough evidence tending to establish ordinary care to submit the question of fact to the jury.

"The court gave but one instruction for the plaintiff, and in regard to the degree of care required of the deceased it contained the following: 'If the jury further believe from the evidence that said Joseph Ouska, at the time of the injury, was exercising due and proper care, and was using due and reasonable care and means to foresee and prevent said injury.' etc. It is claimed by the defendant that the words 'at the time of the injury' restrict the exercise of due care on the part of the deceased to the moment of the injury. We do

Penn. Co. v. Frana, 112 Ill. 398; *C. & I. R. R. Co. v. Lane*, 130 Ill. 116. Nor should a cause ever be withdrawn from the jury, unless the testimony is of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it. (*C. & N. W. R. R. Co. v. Snyder*, 128 Ill. 655). In the present case the plaintiff, in returning from his work to his home, on July 18, 1887, between five and six o'clock in the afternoon, was walking westward on the north sidewalk of Twenty-fifth street in Chicago, when he came to the place where appellant's railroad tracks cross said street. At this point eight tracks, running north and south, cross Twenty-fifth street. Plaintiff stopped on the easternmost unclosed track, and looked westward, and also southward towards Twenty-sixth street. Upon one of the western tracks a passenger train was moving south across the street; it would appear that another passenger train was moving north over another track; freight cars were moving across the street on the second track west of where he stood. While he was looking westward, with his face turned a little towards the north, some cars moving from the south across the street upon the track on which he stood, struck him from the rear, knocked him down and injured one foot so that it had to be amputated, and the other so that it was seriously disabled.

not concur in that view. The words 'at the time of the injury,' as used in the instruction, have reference to the whole transaction and all that occurred from the time the deceased reached the tracks until he was killed. *L. S. & M. S. R. Co. v. Johnsen*, 135 Ill. 653; *C. & A. R. Co. v. Fisher*, 141 Ill. 625, 9 Am. Neg. Cas. 248.

"After the court had read the instructions to the jury, one of the jurors asked the court the question, 'How as to the rate of speed?' and the court then instructed the jury, in writing, as follows: 'The rate of speed is a question of fact for the jury.' It is contended that the instruction is erroneous. The main question before the jury was whether the deceased lost his life through the negligence of the defendant, and, in arriving at a solution of that question, the rate of speed of the train was a fact, in connection with

other facts, which the jury might properly consider. This was no doubt what the court intended by the instruction, and for that purpose we do not regard it erroneous. We do not think the jury could be led to believe that, under the instruction, they had the right to determine absolutely the rate of speed at which defendant's train might run at the crossing, or that they had the right to find any special negligence that they might see proper. If the instruction would bear such a construction, it might be held erroneous, but we do not think it could be construed in that way. The judgment of the appellate court will be affirmed." *GARDNER & MCFADON* and *PLINY B. SMITH* appeared for appellant; *JESSE COX* and *GIDEON F. LANAGHEN*, for appellee. Judgment for plaintiff for \$5,000 affirmed.

Plaintiff states that he looked south a few seconds before he was struck and saw no cars coming from that direction towards him. This might well be true, as the cars which struck him were suddenly switched off from a track further to the west, and placed upon the track on which he was standing, and then pushed or "kicked" rapidly on said last-named track towards the north across Twenty-fifth street. It is said that, if he looked to the south as he said he did, he must have seen the cars which struck him. But he was obliged to look westward at the same time, in order to avoid the passenger and freight trains which were there crossing the street ahead of him. His attention may have been distracted from a careful view towards the south by the necessity of looking towards the west. The cars may have been thrown so suddenly upon the track on which he stood, and which he evidently supposed to be unoccupied, that he did not notice the movement in time to retreat. The evidence tends to show, that the grade slopes downward from the south to the north at this point; that an engine had pushed, or "kicked," the cars, which struck him, along this down grade upon the track where he stood, and then was disconnected from the cars, leaving them to move northward over Twenty-fifth street by their own momentum; that, while these cars were thus moving towards him, there was not only no engine attached to them and no bell sounding, or whistle blowing, but there was no brakeman upon them in such a position as to control them, and no flagman anywhere in sight to give warning of their approach.

The plaintiff had as much right to be upon Twenty-fifth street as the railroad company had to be there with its cars. It was a public street, and its use by the company was subject to the right of the general public to use it. Plaintiff could hardly avoid standing upon one of the tracks, as the street crossing was filled and interlaced with a network of tracks. Where railroad companies thus cover a public street with a large number of tracks, they must observe unusual care and take extra precautions to avoid injury to persons passing along the street or sidewalks. Plaintiff had a right to believe, that a train of cars would not be allowed to cross the street where he was standing, without giving him warning by bell, or whistle, or flagman. He was not obliged to suppose, that the railroad company would be guilty of such reckless and gross negligence as to suddenly transfer a number of cars upon an apparently unoccupied track, and then shove or "kick"

them thereon upon a descending grade, across a public street in a crowded city, without engine, or bell, or whistle, or brakeman, or flagman, or note of warning of any kind.

It was a matter for the jury to determine, under all the facts and circumstances as thus detailed, whether or not the plaintiff was exercising due and proper care in his efforts to cross the street. The trial court committed no error in refusing to take the case from the jury.

It is claimed that the verdict is inconsistent with the special findings. The jury found specially, in answer to questions submitted by the defendant, that plaintiff stopped and stood upon the track where he was struck; that, before he so stopped, and while he so stood, he looked to see if any cars were approaching on that track; that there was nothing to prevent him from seeing the approach of the cars which ran over him, if he had looked, nor anything to obstruct the view of the track from the point where the cars started to the place where they struck him, and that said cars could be seen by a person standing by the side of the track through the entire distance between the point from which they started, and the point where they struck the plaintiff.

The proof tends to show that the track, on which he stood, was a switch track terminating a few feet south of the sidewalk on the south side of Twenty-fifth street. If he had seen the cars when he looked, they may have been on a track to the west, and not on the track where he stood, and, therefore, not in a position where they seemed to threaten any danger to him. The jury may have believed, what the evidence tends to show, that after he turned his look from the south to the west as above stated, the cars, which had been on another track, were suddenly switched over upon the track east of them, and shoved rapidly forward down the grade towards his position. The evident necessity of looking in two directions, and the division of attention resulting therefrom, may have affected the accuracy and clearness of his observation. Under this view of the facts, the special findings cannot be regarded as being inconsistent with the finding, involved in the verdict, that plaintiff was exercising ordinary care and caution.

It is objected, that the court refused to require the jury to find specially upon certain questions of fact. Defendant's counsel tendered twenty questions to be submitted to the jury. Of these the court submitted fourteen and refused to submit six.

Counsel only complains in his brief of the refusal to submit three of the six, that is to say, the 8th, 13th and 17th. The latter questions called upon the jury to state whether the plaintiff took any precautions for his safety before stepping upon the track where he was hurt, or while standing thereon, and whether he made any effort, before stepping upon the track, to ascertain whether any cars were approaching thereon. Without considering the point made by counsel for appellee, that the facts to be found were merely evidential and not ultimate, under the doctrine laid down in *C. & N. W. R. R. Co. v. Dunleavy*, 129 Ill. 132, it is sufficient to say that the refusal to submit these questions could not have worked any harm to the defendant, because they were substantially covered by other questions, which were submitted and answered. The finding of the jury already referred to, that plaintiff looked to see if any cars were approaching, answers the question whether he took precautions for his safety. The jury also found, in answer to a question whether plaintiff made any effort to ascertain the approach of the cars, that he "looked both north and south."

It is further objected that the answer given by the jury to one of the questions was not responsive, and that the court should have required the jury to make another finding, as moved by the defendant. The question thus referred to asked whether there was a flagman on the crossing at the time plaintiff approached, and at the time of the accident, giving signals. The jury answered: "None visible from the east." The answer was sufficient, under the circumstances developed by the evidence. The plaintiff and two other witnesses swore that they saw no flagman. They were on the east side of the tracks, and looked towards the west. A witness named Fenton swore that he was there as flagman at the time of the accident, but was employed by the Chicago, Rock Island and Pacific Railroad Company, who owned the two western tracks. If he was really there he was west of the place where the accident occurred, and must have been concealed by the passing trains already referred to. It is not shown that the defendant had a flagman there. The ordinance makes it the duty of the flagman "to signal persons traveling in the direction of any or either of the crossings, and warn them of the approach of any locomotive engine, or any impending danger." This flagman not having been visible and not being in a position where he could warn parties approaching from

the east, the situation, so far as the plaintiff was concerned, was the same as though there was no flagman.

It is charged that the first instruction given for the plaintiff was erroneous. This instruction is substantially the same as the first instruction set out in full and commented upon in *C. & A. R. R. Co. v. Fietsam*, 123 Ill. 518. It was there held that the words "due care," in the first clause of the instruction, were intended to be applied to the second clause thereof. The instruction does not assume, as claimed by appellant, that the defendant's employes were at fault in negligently operating and running the cars, etc., but requires the jury to believe from the evidence that they were so at fault. This objection, that negligence is assumed, was held to be untenable, when made against similar instructions in *L. S. & M. S. R. R. Co. v. Brown*, 123 Ill. 162, and *Mullin v. Spangenberg*, 112 Ill. 144. The phraseology of other instructions given for the defendant was such as to prevent the jury from finding the defendant guilty of negligence, unless they believed from the evidence that it was guilty. It is further objected that the second clause of the instruction allows the jury to find the defendant guilty of negligence generally, without confining them to such negligence as is set up in the declaration. The objection is without force. The first clause contains the following language: "If they believe from the evidence that the plaintiff was injured in the manner stated in the declaration, through the fault of defendant's employes," etc., "as alleged in the declaration," etc. The references here made to the declaration apply as well to the second as the first clause. It was not necessary to repeat these references in the second clause. The two clauses of the instruction are parts of one sentence. A separate conclusion is not announced in each, but one general conclusion is announced at the end of both, which are connected by the conjunction "or," and together constitute one alternative sentence. It is also said that the instruction confined the attention of the jury to the question whether or not the plaintiff was in the exercise of due care at the precise moment, or *punctum temporis*, when the cars struck him. This is hypercriticism. The words "at the time," as used in the instruction, refer to the whole transaction, or series of circumstances, from the time plaintiff reached the tracks to the time when he was injured, leaving it to the jury to determine whether he used due care before he stepped upon the unoccupied track and while he stood

there. If this were not so the defect was cured by several of the defendant's instructions, which required the jury to find that plaintiff was exercising due care both before and at the time of the accident, both while he was on the track and before he went upon it.

The second instruction is objected to because it submits the question to the jury whether the plaintiff was injured by the negligence of the defendant, "as charged in the declaration" — that is to say, in all the counts of the declaration. The first count charged carelessness in the management of the cars; the second, failure to station a flagman on the crossing; the third, failure of the flagman to signal or give warning; the fourth, violation of the statute in not sounding a bell or whistle eighty rods from the crossing; the fifth, moving at a greater rate of speed than that allowed by the statute and the city ordinance. It is said that there was no proof to sustain the charge in the fourth count, because the cars which struck plaintiff started from Twenty-sixth street — one block from the crossing — and did not start at a distance of fully eighty rods from the crossing. In other words, it is claimed, because the statute (Rev. St. Ill. 1889, c. 114, sec. 68) requires a bell or whistle to be sounded "at the distance of at least eighty rods" from the crossing, and to be kept ringing or whistling until the crossing is reached, that a train which begins to move towards a crossing at a point within eighty rods or less than eighty rods therefrom is not bound to comply with the statute. We think that the command of the statute is applicable as well when the cars begin to move within the eighty rods as when the point of starting is fully eighty rods or more than eighty rods distant. It is also said that there was no proof to support the second count, because it was not shown that this particular crossing was in that portion or district of the city where the ordinance required flagmen to be stationed. Appellant is estopped from urging this objection against plaintiff's second instruction, because it asked the court to give, and the court did give at its request, at least two instructions requiring the jury to believe from the evidence, among other things, that there was no flagman on the crossing, and that no signal or warning was given by a flagman, before a verdict could be rendered against the defendant. This was a concession of the point that the presence of a flagman at this particular crossing was a matter proper to be submitted to the jury for their determination. The fact that the

Chicago, Rock Island and Pacific Railroad Company had a flagman on the west side of the tracks tended to show that this crossing was within the territory where the ordinance required flagmen to be stationed.

The third instruction given for plaintiff is objected to because it allows the jury, in estimating the damages, to take into consideration "prospective suffering, and loss of health." The objection is that there was no evidence upon this subject. We think the proof tends to show that the wound inflicted by the crushing of the foot which was not amputated was apt to break out afresh at any time, and that the foot was not in such a condition that it could be used. Plaintiff is obliged to go upon his knees, and use his arms, in order to move his body. There was evidence enough to justify the insertion of these words in the instruction. We discover nothing in defendant's refused instructions which was not embraced in the instructions which were given.

The judgment of the appellate court is affirmed.

CHICAGO CITY RAILWAY COMPANY v. WILCOX.

Supreme Court, Illinois, June Term, 1891.

[Reported in 138 Ill. 370.]

CHILD STRUCK BY CABLE CARS AT STREET CROSSING — IMPUTED NEGLIGENCE — INSTRUCTION. — In an action to recover damages for injuries to a boy, six years old, who was struck by defendant's train of cable cars at a street crossing, the material question turned upon the following instruction as to imputed negligence given at plaintiff's instance: "The court instructs the jury for the plaintiff that if they, from the evidence, believe that the parents are working people, and that the father was not present at the time of the accident, and that the mother was attending to her usual occupation in attending their little store on Harmon court, in such event the law does not require that persons in their station of life shall keep constant watch over their children; nor can the want of such care be imputed to them as negligent conduct; nor can negligence be imputed to the child, on account of its age, he being seven years of age, or about that, at that time." *Held*, that such instruction was not erroneous, the Supreme Court adopting the rule, "that where a child of tender years is injured by the negligence of another, the negligence of his parents or others standing *in loco parentis* cannot be imputed to him so as to support the defense of contributory negligence to his suit for damages" (1).

1. See Note on the Doctrine of Imputed Negligence, pages 151-156, *ante*; also Note on the English Rule in *Thoroughgood v. Bryan*, pages 145-146, *ante*.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook county. The facts appear in the opinion. *Judgment affirmed.*

C. M. HARDY, for appellant.

CHARLES E. POPE and E. F. MASTERSON, for appellee.

Bailey, J. — This was an action on the case, brought by Frank Wilcox, an infant, by his next friend, against the Chicago City Railway Company, to recover damages for a personal injury. The declaration alleges that on the 24th day of June, 1887, the plaintiff was passing along Harmon court in the city of Chicago, at its crossing over the defendant's railway on Wabash avenue; that the defendant, by its servants, was then and there running on said railway a train of cars drawn by cables running underneath the surface of said avenue, and that, while the plaintiff, with all due care, was passing along Harmon court at said railway crossing, the defendant, by its servants, so carelessly and negligently managed and controlled said train of cars, without slackening the speed thereof or ringing a bell, that said train ran upon and struck the plaintiff with great force and violence, and so bruised and injured one of his legs as to render it necessary to amputate the same, thus rendering him a cripple for life. The defendant pleaded not guilty, and on trial the jury found a verdict for the plaintiff, and assessed his damages at \$15,000, and for that sum and costs the plaintiff had judgment. On appeal to the appellate court said judgment was affirmed (33 Ill. App. 450), and by a further appeal the record is now brought to this court for review.

The plaintiff, at the time he was injured, was a child only six years of age, and was living with his father and stepmother on the south side of Harmon court, a few feet east of the corner of Wabash avenue. The evidence tends to show that just before the time of his injury he was on the south-west corner of Wabash avenue and Harmon court, playing with two other boys, and that his stepmother had come out of her house, and was standing on the corner of the opposite side of Wabash avenue. That, as she came out to the corner, the plaintiff called to her, and asked her if she wanted him, to which she replied: "No, you can stay there." That an acquaintance of Mrs. Carroll's coming along, she conversed with her for a few minutes, and then turned to go back to her house, and as she did so, the plaintiff called out: "Mamma, wait; I am coming." That she thereupon stopped,

and stood waiting for the plaintiff, and as she did so she saw a train of cable cars approaching from the north, and motioned to the plaintiff to wait until it had passed, which he did. That, as it passed, the plaintiff walked around the rear end of it, and was immediately struck by another train coming from the south, and received his injury.

The only material question in the case open for consideration here arises upon the third instruction given to the jury at the instance of the plaintiff, which was as follows: "The court instructs the jury for the plaintiff that, if they, from the evidence, believe that the parents are working people, and that the father was not present at the time of the accident, and that the mother was attending to her usual occupation in attending their little store on Harmon court, in such event the law does not require that persons in their station of life shall keep constant watch over their children; nor can the want of such care be imputed to them as negligent conduct; nor can negligence be imputed to the child, on account of its age, he being seven years of age, or about that, at that time." This instruction incorrectly assumes that the plaintiff, at the time of his injury, was one year older than he really was. The trial was in November, 1888, and the evidence is that he was seven years of age the preceding June, which would make him but six years of age June 24, 1887, the date of his injury. But this erroneous assumption was more favorable to the defendant than the evidence warranted, and therefore affords the defendant no just ground of complaint. The instruction, also, while holding that under the facts supposed the negligence of the plaintiff's parents cannot be imputed to him, seems to be based upon the tacit assumption that, under proper circumstances, the rule of imputed negligence might apply. This assumption, if erroneous, was not prejudicial to the defendant, as the defense is based upon the assertion of that rule, as well as the assumption that it should be applied under the facts in this case. The instruction, then, so far as this portion of it is concerned, is free from any valid objection which the defendant can urge, if it can be shown either that under the facts supposed the negligence of the plaintiff's parents cannot be imputed to him, or that the doctrine of imputed negligence can have no application to a case of this character. We prefer to consider the latter of these two propositions, and the question then is whether the negligence of the plaintiff's parents, even if such negligence is proven, can be

imputed to the plaintiff, so as to be available in support of the defense of contributory negligence. Upon this question the decisions of the courts of the various States are very much in conflict. The leading case among those which hold that the negligence of a parent, custodian, or one in *loco parentis* should be imputed to a child not capable of caring for his own safety, is *Hartfield v. Roper*, 21 Wend. 615, decided by the Supreme Court of New York in 1839. In that case the plaintiff, a child about two years old, was alone in a traveled portion of a highway some distance from any house. The defendant was driving a sleigh, and the child was run over by the horses and injured before the defendant or any of those in the sleigh saw him. The plaintiff having recovered a verdict, a new trial was granted on the grounds: First, that the evidence failed to show negligence on the part of the defendant; and, second, that negligence on the part of the plaintiff's parents was clearly shown. The court held that, although the child, by reason of his tender age, was incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of his parents furnished the same answer to an action by the child as would the omission of such care by the plaintiff himself in an action by an adult. The reasoning of the court, embodied in an elaborate opinion by Mr. Justice Cowen, is, in substance, that the custody of the child was confided by law to its parents; that said child could not be exposed, as it was in that case, without gross negligence; that an adult injured by a collision could not recover if he had contributed to the injury; that the same rule was applicable to children, and could be enforced only by requiring care from those who have them in custody; that an infant is not *sui juris*, but belongs to his custodian; that the custodian is his agent, and the custodian's neglect is therefore his neglect. The rule thus established has been adhered to, with slight modifications, by the courts of New York, and has also been adopted by the courts of several of the other states, and is usually known as the "New York Rule." What is known as the "English Rule" is declared in *Waite v. N. E. Ry. Co.*, El. Bl. & El. 719 (1). In that case the plaintiff, an infant about five years old, was

1. In *Waite v. North Eastern R'y* five years old was in the care of his Co., 28 L. J., Q. B. 258; El., Bl. & El. grandmother, at a station of a railway 942; affirming El., Bl. & El. 719; 27 L. company. For the purpose of going J. Q. B. 417, it appeared that a child by it, she purchased a ticket for herself

in charge of his grandmother, who purchased tickets for both at a station, with the intention of taking the train to another point on said line of railway. In crossing the track to reach a platform they were run down by a train under circumstances of concurrent negligence on the part of the grandmother and the servants of the company. The grandmother was killed, and the plaintiff seriously injured. The court, in holding that no recovery could be had, repudiated the idea that there was any relation between the plaintiff and his grandmother akin to that of principal and agent, but placed its decision upon the theory that he and she were identified the same as though he had been in her arms. The decision turned upon the legal identity between the infant plaintiff and his custodian, and did not go beyond that class of cases in which the parent or custodian is present and controlling the infant at the time of the injury. In this country, in many of the states, the rule established by the case of *Hartfield v. Roper* has been seriously criticised and condemned. The leading case in which that rule is repudiated, and in which is established what has sometimes been called the "Vermont Rule," is *Robinson v. Cone*, 22 Vt. 213. In that case a boy, less than four years of age, was attending school in the country, and, as he was returning home he was amusing himself by riding down hill on his sled. While engaged in this sport, as he was lying upon his breast on his sled, with his legs hanging over the sled, he was run upon and injured by the two-horse sleigh of the defendant, who was driving down hill on a smart trot. The court in its decision repudiated the doctrine of imputed negligence, and held that, although a child of tender years may be on the highway through the fault or negligence of his parents, yet, if he be injured through the negligence of the defendant, he is not precluded from obtaining his redress; all that is required of the infant plaintiff being that he exercise care and prudence commensurate with his capacity.

The rule denying the doctrine of imputed negligence is now recognized and enforced by the courts of many of the States, and is supported by the reasoning and authority of text-writers, whose

and one for him. In crossing the line to be ready for the train, they were knocked down by a goods train. The jury found that there was negligence in the servants of the company, and in the grandmother. *Held*, that the child was so identified with his grandmother, that, by reason of her negligence, an action in his name could not be maintained against the company.

opinions are justly entitled to a high degree of consideration. Among them may be mentioned Mr. Bishop, who in his recent treatise of Non-Contract Law, section 582, says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor or shiftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But by the new doctrine, after a child has suffered damages, which confessedly are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any of the several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one making the contribution. In these and other respects, it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law." See full discussion of the question of imputed negligence in case of injury to children in Wharton on Negligence, § 314 *et seq.*; Beach, Contrib. Neg., §§ 38-48. It seems to be assumed by several of the writers on the subject that this court is committed to the doctrine that in a suit by a child to recover damages caused by the negligence of the defendant the negligence of the plaintiff's parents or custodians may be imputed to the plaintiff in support of the defense of contributory negligence. While there is in some of the cases some foundation for this assumption, yet, in our opinion, the question has never been so considered or determined by this court as to make it the settled rule in this state. Most of the cases to which reference is made as supporting said doctrine were suits brought by a parent in his own right, or as the legal representative of the child, where the death of the child was alleged to have been caused by the negligence of the defendant. Such was the case in *City of Chicago v. Major*, 18 Ill. 349; *City of Chicago v. Starr*, 42 Ill. 174; *C. & A. R. Co. v. Becker*, 76 Ill. 25, 84 Ill. 483; *Hund v. Geier*, 72 Ill. 393; *City of Chicago v. Hesing*, 83 Ill. 204, and *T. W. & W. R. Co. v. Grable*, 88 Ill. 441. Where an action for the negligent injury of an infant is brought by a parent, or for the parents' own benefit, it is very justly held

that the contributory negligence of such parent may be shown in bar of the action. That is only a phase of the general rule that the contributory negligence of the plaintiff is a defense. Beach, *Contrib. Neg.*, § 44.

Of the remaining cases to which we are referred, in which the doctrine of imputed negligence has been discussed, the first is *A. B. R. Co. v. Grimes*, 13 Ill. 585. In that case suit was brought by an adult to recover damages of the railroad company for killing a mare, and the case of *Hartfield v. Roper* is incidentally referred to in the opinion as indicating an exception to a general rule which the court had laid down in its decision; but there is nothing indicating an approval or adoption of the rule there announced. In *C. & A. R. Co. v. Gregory*, 58 Ill. 229, suit was brought by a child not quite five years of age, and the judgment in favor of the plaintiff was affirmed; the court holding that no negligence was shown, either on the part of the plaintiff or his mother, and there was therefore no occasion for determining whether her negligence, if she had been negligent, would have been imputed to the plaintiff. In *City of Chester v. Porter*, 47 Ill. 66, suit was brought by a child about three years old to recover damages for injuries caused by his being run over by an ox team and cart at work on the street. A judgment in favor of the plaintiff was reversed, this court holding that there was no evidence in the record of any negligence on the part of the defendant, and the fact that the plaintiff ought not to have been permitted to be on the street alone is alluded to only in the discussion of the want of evidence tending to charge the defendant with negligence. The defense of contributory negligence is not spoken of. In *P. Ft. W. & C. R. Co. v. Bumstead*, 48 Ill. 221, a judgment in favor of the plaintiff was affirmed, the court holding, so far as the defense based upon the alleged negligence of the plaintiff's parents was concerned, that no such negligence was proved, and there was therefore no occasion to either assert or discuss the doctrine of imputed negligence. In *Gavin v. City of Chicago*, 97 Ill. 66, the plaintiff brought suit for an injury alleged to have been caused by the negligence of the city authorities in improperly constructing or managing a swing-bridge over the Chicago river. The defendant attempted to show negligence on the part of the plaintiff's mother in permitting him to be on the street in the vicinity of said bridge, unattended. A judgment in favor of the defendant was affirmed, the court holding

that there was no proof of negligence, either on the part of the plaintiff's mother or of the city authorities. It is apparent that in none of the cases above mentioned was there any occasion for the court to determine whether, as a rule of law, the negligence of the plaintiff's parents or custodian would sustain the defense of contributory negligence, nor is there any attempt in any of them to consider or discuss the rule. In several of them language is used which would seem to imply a tacit recognition of the doctrine of imputed negligence, but in none of them was the adoption of that doctrine essential to the decision; nor can we suppose from the language used that the court intended to commit itself definitely to an affirmance of that doctrine. The only remaining decision of this court on this question to which our attention has been called is that of *Ohio & Miss. R. Co. v. Stratton*, 78 Ill. 88, 2 Am. Neg. Cas. 602. There the plaintiff, who at the time of his injury was ten years old, was traveling on the railroad, in company with, and in the immediate custody of, his father. On arriving at their destination, both repaired to the platform of the car while it was yet in motion, the plaintiff taking his station on the lowest step of the platform, and his father on the next step above and behind him, both having baggage in their hands. Both stepped off while the train was still moving quite rapidly, and the plaintiff, on striking the station platform was thrown by his momentum under the cars, and severely injured. This court reversed a judgment in favor of the plaintiff, not for any error of law committed at the trial, but solely on the ground that it was against the evidence. In the opinion the conclusion was reached that the evidence failed to charge the defendant with negligence, and also that it showed that the plaintiff, or at least his father, was guilty of negligence in stepping off the train while in rapid motion. Clearly, if no negligence on the part of the defendant was shown, there was no right of action, and whether the plaintiff or his father was negligent was wholly immaterial. A discussion of the doctrine of imputed negligence was unnecessary to a decision of the case. The rule, however, was stated that, if the negligence of the plaintiff's father was the proximate cause of the plaintiff's injury, the defendant could, on no just principle, be held liable. This was, no doubt, a recognition of the rule which has been spoken of above as the English rule — that where the parent is present, and in the immediate control of the child, the parent's negligence

may be imputed to the child. This court, however, cannot fairly be said to be committed to a doctrine upon the principle of *stare decisis*, by its recognition or assertion in a case which does not call for its application, and the decision of which rests wholly upon other grounds. Not being concluded, therefore, by any of our former decisions, we are disposed to adopt the rule which seems to us to be most reasonable and most in conformity with the recognized principles of the common law, viz., that where a child of tender years is injured by the negligence of another, the negligence of his parents or others standing *in loco parentis* cannot be imputed to him so as to support the defense of contributory negligence to his suit for damages. So far, then, as this branch of the case now under consideration is concerned, therefore the instruction given contained no error as to which the defendant has any just ground of complaint (1).

1. *Imputed negligence.* — In *Elgin, Joliet & Eastern R'y Co. v. Raymond*, 148 Ill. 241 (1893), where a child about six years of age, in returning home from school with sister about two years her senior, was injured by her foot getting caught on railway track at crossing, the Supreme Court (per BAILEY, J.), said: "Counsel on both sides seem to have tried the case on the theory that the negligence of the plaintiff's parents might be imputed to her in support of the defense of contributory negligence, and both submitted a series of instructions, which were given to the jury, based upon that theory of the law. If what thus seems to be conceded on both sides is the rule, we see nothing in the evidence objected to which was improper. It merely tended to show that neither the plaintiff's father or mother was so situated as to make it practicable for them to accompany the plaintiff to and from school, and that there was no member of the family that could accompany her except the older sister, who was with her and who was killed. The date of the subsequent birth of the witness' child was proper as tending to show how far advanced in her pregnancy the plaintiff's mother was at the date of the injury. We do

not think that this testimony should have been excluded, as is claimed by counsel for the defendant, because of its tendency to evoke from the jury sympathy for the plaintiff. No fact was elicited except such as had a direct bearing upon the question of the inability of the plaintiff's parents or other adult member of the family to accompany her to and from school, and so far as it bore upon that question it was competent. The pecuniary circumstances of the family, or the dependence of the family upon the earnings of the father for their support, was not touched upon, as was the case in *City of Chicago v. O'Brennan*, 65 Ill. 160, cited by counsel. It is true this court held in *Chicago City R'y Co. v. Wilcox*, 138 Ill. 370, that where a child of tender years is injured by the negligence of another, the negligence of his parents, or others standing *in loco parentis*, cannot be imputed to the child, so as to support the defense of contributory negligence to his suit for damages. But as both parties, on the trial of this case, seem to have conceded that the contrary rule prevailed, and tried the case on that theory, the defendant can scarcely be permitted now to recede from that position, and assign for error

But it is further objected that said instruction is erroneous in holding, as a matter of law, that the plaintiff, who at the time of his injury was only six years of age, could not be charged with personal negligence which the jury could consider as tending to sustain said defense. The application of the doctrine of contributory negligence to the conduct of young children is a difficult one, and very naturally has led to a considerable difference of opinion. The two opposing views most commonly met with are: First, that up to a certain age, the precise limit of which is not, and perhaps cannot, be well defined, a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law. The rule thus contended for is sometimes said to be analagous to the rule of the common law which exempts children under seven years of age from criminal responsibility. It has accordingly been held that children of eighteen months, of two years, of two years and ten months, of four years, under five years, of five years, of six years, under seven years, and even seven years of age, are incapable of such negligence. Bish. Non-Cont. Law, § 586, and authorities cited. This rule seems to have been recognized in this State with more or less distinctness in the following cases: *C. & A. R. R. Co. v. Becker*, 84 Ill. 483; *C. & A. R. Co. v. Gregory*, 58 Ill. 226; *City of Chicago v. Hesing*, 83 Ill. 204; *Gavin v. City of Chicago*, 97 Ill. 66; *T. W. & W. R. Co. v. Grable*, 88 Ill. 441; *Chic. W. D. R'y Co. v. Ryan*, 131 Ill. 474; *C., St. L. & P. R. Co. v. Welsh*, 118 Ill. 572. The other view is that young children are bound to use such care, and such care only, as is usually exercised by children of the same age and degree of intelligence, and that it is always, therefore, a question of fact to be determined by the jury whether, in a given case, the child is in the exercise of proper care; his tender years, his intelligence or the want of it, and all the circumstances by which he was surrounded being taken into account. Under this rule, as is claimed, it can never be laid down as a matter of law that any child, however young, is incapable of contributory negligence, it being always a

the admission of testimony which that theory of the law rendered necessary and competent."

In the Raymond case (preceding paragraph), plaintiff recovered verdict for \$15,000, and the Appellate Court having

required plaintiff to remit the sum of \$5,000 from the damages, which was done, affirmed judgment as to the residue, and the Supreme Court affirmed the judgment.

question of fact for the jury. The following cases are referred to as giving some support to this rule; *C. & A. R. Co. v. Becker*, 76 Ill. 25; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *Kerr v. Forgue*, 54 Ill. 482; *C., R. I. & P. R'y Co. v. Eininger*, 114 Ill. 79. But as we are disposed to view the present case, it will be unnecessary for us to determine which of these two rules should be adopted, for, even admitting that the rule last mentioned is the true one, we are of the opinion that there was no prejudicial error in said instruction. While we are not permitted to consider the evidence for the purpose of determining what is or is not proved, all questions of that character being conclusively settled by the judgment of the appellate court, we may properly consider the evidence, and all inferences which may legitimately be drawn from it, for the purpose of determining the propriety of the rulings of the court in giving or in refusing instructions to the jury. If, then, it can be seen that an instruction given, though embodying an incorrect proposition of law, could not, in view of the evidence and of all inferences which may properly be drawn from it, have materially prejudiced the party complaining of it, the judgment will not on that account be reversed. We are of the opinion that the evidence, when considered in connection with the fact that the plaintiff at the time he was injured was but six years old, does not warrant the inference that he was guilty of contributory negligence. His attention, just before he was injured, was attracted to the train of cable cars approaching from the north; and, in obedience to his mother's directions, he waited until it had passed by, and he then attempted to cross the track in the rear of that train. He failed to notice another train coming from the opposite direction on the other track, and which at the time must have been on the other side of the train at which he was looking, and in all probability hidden from his view. The two tracks are near together, and the instant the plaintiff passed the track on which the train was running south, he was struck by the train running in the opposite direction on the other track and injured. The only negligence charged was in not seeing, and thereby avoiding, the train running north. There is no pretense that the plaintiff saw that train, or that it was in any way brought to his attention before it struck him. If he had been an adult, and capable of the observation, reason, and reflection of a man of mature years, it would probably have been his duty to know and remember that a train might possibly be in motion on the

other track, and to take such precautions as were reasonably necessary to assure himself that such was not the case before attempting to cross it. But to expect such a course of reasoning and reflection of a child but six years old would be contrary to ordinary human experience. Doubtless a child as young as the plaintiff was may possess to a very considerable degree what may be termed the instinct of self-preservation, and be, in consequence, capable of exercising very considerable care for his own safety. But when moved by that instinct he acts only in view of what he sees, or what is actually present to his senses. To guard against an unseen danger, or one which has not come within the sphere of his observation, requires an exercise of reason and reflection of which so young a child is seldom capable, and for which the law, administered on humane principles, will scarcely hold him responsible. The only theory, in view of the evidence, upon which the jury could have found the plaintiff guilty of negligence in attempting to pass in the rear of the train going south was that it was his duty to observe that there was still another track to cross, and to reflect that there might be another train approaching on that track; and, being warned of possible danger by such course of reasoning, to have then looked to see whether such other track was clear before attempting to cross it. Such course of conduct may well have befitted an adult, but is scarcely to be expected of a child six years old. We are of the opinion that if, upon the evidence, the jury had found specially that the plaintiff was guilty of contributory negligence, such finding could not have been sustained. Whether the instruction, then, was or was not correct in holding that, on account of the plaintiff's tender age, negligence could not be attributed to him, it manifestly did no harm, as the jury could not have found otherwise than they did on that question if the instruction had not been given, or if the contributory negligence of the plaintiff had been submitted to them as a question of fact.

We find no material error in the record, and the judgment of the appellate court will be affirmed. WILKIN, J., dissented.

PEDESTRIAN RUN OVER AND KILLED BY LOCOMOTIVE AT CROSSING — DUE CARE — EVIDENCE. — In **ILLINOIS CENTRAL RAILROAD COMPANY v. NOWICKI**, ADM'X, 148 Ill. 29, (1893) an appeal from the Appellate Court for the First District, heard in that court on appeal from the Superior Court of Cook county, in action for damages for negligently causing death of plaintiff's

husband, the court (per WILKINS, J.), stated the facts as follows: " The first count of the declaration alleged that the deceased, while on one of the streets of Chicago, exercising due care, was struck and killed by a locomotive of the defendant, negligently run over and across said street at a rapid and reckless rate of speed. Also, by a second count, that the defendant negligently failed to erect gates at said crossing, whereby the deceased, while walking over the said crossing, using due care, was struck by one of defendant's locomotives and killed. A plea of not guilty was filed, and a trial was had resulting in a judgment for \$5,000 and costs. That judgment was affirmed in the Appellate Court. At the close of the plaintiff's evidence the court was asked to instruct the jury to return a verdict for the defendant, which was denied. After the evidence was all in the request was renewed, and again denied. That ruling is assigned for error, and is the principal ground of reversal now urged. It is insisted that the evidence, and all inferences which can properly be drawn from it, fail to prove that the deceased used reasonable care to avoid the injury complained of, and therefore comes under the rule that when a material part of the plaintiff's case is wholly unsupported by proof, the court should exclude all the evidence from the jury, or instruct it to return a verdict for the defendant." * * * In reviewing the case the court said: " The evidence in this case shows that the defendant was operating a double track railroad, running substantially north and south across Eighty-third street, in South Chicago, the tracks marking a sharp curve to the east immediately south of the street, and at a distance of about 120 feet across the tracks of the Baltimore and Ohio railroad. The east track was used for south bound trains, and the west one for those going north. About eight o'clock in the evening a train headed south stopped to take water from a tank on the east side of the track, fifty feet south of the street, the cars standing on the crossing. At the same time a train from the south, on the west track, ran across the street, as the evidence tends to show, at a high rate of speed, and while on the crossing the engineer saw the body of the deceased roll off the pilot of his engine. The night was very dark, and it was raining. It is clear, from all the evidence, that by reason of the curve in the tracks and the position of the south bound train the view of the approaching train going north was more or less obstructed. It was proved that deceased lived east of the tracks, near the Eighty-third street crossing, and worked at a rolling mill west of the railroad. The evidence also tends to show that Eighty-third street was the convenient and usual route from the rolling mill to the dwelling of the deceased. He was seen a moment before he

was struck, standing on the crossing between the rails of the west track. The plaintiff, his widow, testified that he left home about four o'clock that afternoon with some papers, intending to go to a real estate office, on business connected with a lot, and she saw him no more until after his death. She also stated that he was "a sober, good, hard-working man," and that when he left her that afternoon "he was a strong man — sound." The conclusion from the facts proved is reasonably certain that the deceased was, at the time he was struck, attempting to cross the railroad track on Eighty-third street, from the west, for the purpose of reaching his home. It is also reasonable to suppose that he expected no train on the west track while the one was standing in front of him — that his attention was directed to the train which obstructed his way, and which he doubtless expected momentarily to move on. In other words, the evidence tends to show that he was acting reasonably, in pursuance of his purpose, and as men ordinarily act under like circumstances. That he was, when last seen, between the rails, instead of standing on some other part of the crossing, was a circumstance to be taken into consideration by the jury, with all the other facts, in determining whether he used ordinary care, but is by no means conclusive proof of his negligence. He had a lawful right to be upon any part of the crossing, and whether, under all the circumstances, he exercised proper care for his personal safety in being between the rails, was a question of fact. Proof that the deceased was a sober, industrious man, possessed of all his faculties, also tended to prove that he was in the exercise of proper care. (*Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Chicago, R. I. & P. R'y Co. v. Clark*, 108 Ill. 113; *Toledo, St. L. & Kan. City R. R. Co. v. Bailey*, 145 Ill. 159.) The argument on behalf of appellant proceeds upon the theory, that inasmuch as the burden of proof is upon the plaintiff to show due care on the part of deceased, there must be testimony tending to prove that he did certain things usually done by one about to cross a railroad track, and which generally should be done, as, looking and listening for approaching trains. If such proof were necessary in cases of this kind, a recovery could seldom, if ever, be had, however inexcusable the negligence of the defendant. The law is not so unreasonable. The foregoing decisions of this court are directly to the contrary. Other authorities are to the same effect. [Citing *Way v. Ill. Cent. R. R. Co.*, 40 Iowa, 345; *Gay v. Winter*, 34 Cal. 153; *Teipel v. Hilsendegen*, 44 Mich. 461; *Mayo v. Boston R. R. Co.*, 104 Mass. 137, 3 Am. Neg. Cas. 773.] We entertain no doubt that under the repeated decisions of this court, as well as upon the authorities, there was competent

evidence in this case tending to support the allegation of due care on the part of the deceased, and that the court very properly refused to take it from the jury." Judgment affirmed. SIDNEY F. ANDREWS and JAMES FENTRESS appeared for appellant; GIBBONS, KAVANAGH & O'DONNELL, for appellee.

EAST ST. LOUIS CONNECTING RAILWAY COMPANY v. O'HARA.

Supreme Court, Illinois, June Term, 1894.

[Reported in 150 Ill. 580.]

PEDESTRIAN STRUCK BY TRAIN AT CROSSING — WANTON NEGLIGENCE — INTENT—PROOF.—Where the evidence in an action to recover damages for injuries sustained by being struck by train while crossing track tends to show that defendant's servants, at the time plaintiff was injured, were running their engine in the dark without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much frequented street, and where many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and wilful disregard of the rights and safety of the public generally, so as to amount in law to wanton and wilful negligence, and it is not necessary, in order to raise an inference of such negligence, to prove that the defendants' servants were actuated by ill will towards plaintiff or to have known that he was in such position as likely to be injured.

WRIT of error to the Appellate Court for the Fourth District; heard in that court on appeal from the Circuit Court of St. Clair county. The facts appear in the opinion. *Judgment affirmed.*

CHARLES W. THOMAS, for plaintiff in error.

JESSE M. FREELS and VIRGIL RULE, for defendant in error.

Bailey, J. — This was an action on the case, brought by James O'Hara against the East St. Louis Connecting Railway Company, to recover damages for a personal injury. The defendant owns and operates a double-track connecting railway in the city of East St. Louis, used for transferring cars to and from the various railways which have their terminus there. This railway runs north and south, nearly parallel with the easterly bank of the Mississippi river, the wharves and landing of the Wiggins Ferry Company being between it and the river. Front street, in East St. Louis, runs north and south and along the east side of these wharves, and there is a conflict in the evidence as to whether the tracks of the railway in question are on or immediately west of that street. The plaintiff's contention is that the

tracks are on the westerly part of the street, while the defendant claims that the westerly track — the one upon which the plaintiff received his injury — is at no point upon the street. The evidence tends to show, however, that whether the westerly track is on the street or not, the tracks are not inclosed or separated from the street on the one hand, or the wharves of the ferry company on the other, but are so connected with the public street as to be apparently a part of it, and that the public have been in the habit for many years of crossing over the track at that place in going from Front street to the landing of the ferry company. The evidence tends to show that on the 23d day of October, 1889, in the evening, after dark, the plaintiff, who was in the employ of the St. Louis Transfer Company as a teamster, after having put away his team in the barns of that company, which are located east of Front street, started in a direct line across Front street and the tracks of the defendant to the ferry landing, and that as he was crossing the westerly track he was struck by one of the defendant's engines backing up from the south, and was so injured as to require the amputation of his right arm. The plaintiff testifies that before going on the tracks he looked in both directions, and saw no engine approaching and no light. It is charged in the declaration, and the evidence tends to show, that at the time the plaintiff was injured the engine was being run without a headlight, and with no bell ringing, and that it was running at a dangerous and unlawful rate of speed. In the second or additional count it is alleged that these acts of negligence were wanton and willful, and that the engine was being run at a rate of speed prohibited by an ordinance of the city of East St. Louis. The defendant pleaded not guilty, and at the trial the jury found the defendant guilty, and assessed the plaintiff's damages at \$5,000. The court, at the instance of the defendant, also submitted to the jury several questions of fact to be found specially, and the jury thereupon found: 1. That the headlight on the locomotive which struck the plaintiff was not burning at the time of the accident; 2, that the bell of the locomotive was not ringing at the time of the accident; 3, that the plaintiff was not lying upon the defendant's track just before he was injured; 4, that the servants and agents of the defendant injured the plaintiff willfully and on purpose; and 5, that the place where the plaintiff was injured was in a public street. The court, after denying the defendant's motion for a new trial, gave judgment

in favor of the plaintiff for the amount of damages found by the jury and costs. On appeal to the appellate court that judgment was affirmed, and the defendant now brings the record to this court by writ of error, and assigns for error the judgment of the appellate court.

The facts being conclusively settled in favor of the plaintiff, the only errors submitted for our consideration are those which call in question the rulings of the court in the instructions to the jury, in the admission of evidence, and in failing or declining to restrain the plaintiff's counsel from indulging in certain remarks in his closing address to the jury.

Complaint is made of the first and only instruction given to the jury at the instance of the plaintiff. That instruction was as follows: "The court instructs the jury that if they believe and find from the evidence that the plaintiff, prior and at the time of receiving the injury complained of, was using due and ordinary care for his personal safety, and to avoid and prevent his injury, and without notice of approaching danger, that the defendant was then and there guilty of negligence as charged in the additional count of the declaration, and that the plaintiff, in consequence thereof, was without his fault then and there injured as alleged in said additional count, then they will find for the plaintiff, and assess his damages at such sum as they believe from the evidence to be just compensation for the injuries so sustained; not, however, to exceed \$10,000, the amount sued for." It is contended, in the first place, that it was error for the court, by the instruction, to call the attention of the jury to the amount sued for, and instructing them that the damages awarded by their verdict in case they found for the plaintiff should not exceed that sum. Although such reference to the amount of the *ad damnum* in the declaration is not to be commended, still we do not think that it constituted such error as calls for a reversal of the judgment. That the amount of the *ad damnum* was the maximum beyond which the jury could not go is unquestionably a correct legal proposition, and we cannot suppose that any jury of ordinary intelligence would regard such reference alone as any intimation by the court that the damages to be assessed should reach or approximate that sum. As the jury in fact assessed the plaintiff's damages at only \$5,000 — a sum which, in view of all the evidence, cannot be regarded as unreasonable or exorbitant — we do not think the jury could have been misled or unduly influenced by the instruction.

In the next place, it is insisted that the instruction ignored the defense that the plaintiff, at the time he was injured, was on the private right of way of the defendant, and proceeds upon the theory that the question of the precise place where the injury occurred, whether on the defendant's right of way or on the street, is a matter of no consequence. Whether the instruction is subject to this criticism or not, it is sufficient to say that the evidence as to whether the track where the plaintiff was injured was in the street or not was conflicting, and the jury, at the instance of the defendant, found specially that it was in the street. That fact being thus settled adversely to the defendant, it is not important that the instruction ignored a defense based upon a hypothesis which the jury expressly found was not proved.

It is also contended that, as the instruction is based upon the charge of negligence contained in the second or additional count of the declaration, there was no evidence before the jury tending to support it. In that count the several acts of negligence charged are alleged to have been committed wantonly and willfully, and it is claimed that there is no evidence tending to prove wanton or willful misconduct. If it be true, as the evidence tends to show, that the defendant's servants, at the time the plaintiff was injured, were running their engine in the dark without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much-frequented street, and where many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill will directed specifically towards the plaintiff, or to have known that he was in such position as to be likely to be injured.

Error is assigned upon the refusal of the court to give the following instructions, asked on behalf of the defendant: "The court instructs the jury that, although they may believe from the evidence that defendant's servants were in fact guilty of some or all of the acts of negligence charged in the declaration, yet, if they further believe from the evidence that plaintiff, at the time he was injured, was lying upon defendant's track, outside the limits of a street, he cannot recover in this case." This

instruction makes the mere fact (if it were a fact) that the plaintiff, at the time he was injured, was lying upon the defendant's track, outside the limits of the street, proof of negligence *per se*, so as to constitute in law a conclusive bar to his recovery. While his being found lying upon the track would, unexplained, be very cogent evidence of negligence, the question would, after all, be a question of fact for the jury, since his being found in that position may have resulted from various supposable causes not inconsistent with the exercise of reasonable care on his part. The instruction, as asked, therefore, was clearly erroneous.

But there is another reason why the refusal of this instruction cannot be regarded as prejudicial to the defendant. The jury specially found that the plaintiff, at the time he was injured, was not lying upon the track of the defendant's road, and also that the place where he was injured was not outside of the limits of the street. The hypothesis of the instruction, then, being one which the special findings of the jury have expressly negatived, no benefit could have resulted from giving such instruction, as it manifestly could have had no influence upon the verdict.

The next contention is that the court erred in permitting a section of an ordinance of East St. Louis to be read in evidence to the jury which provides that no railroad company shall run any passenger train or cars, or permit the same to be run, within the limits of the city, at a greater rate of speed than ten miles an hour, nor any freight train or car at a greater rate of speed than six miles an hour, under the penalty of not less than \$25 nor more than \$100. The point made is that this ordinance has no application to locomotive engines when running alone, and forming no part of a train of cars. We are not disposed to adopt that construction of the ordinance. The purpose of the ordinance was to prevent injury to persons and property from the running of trains and cars at too high a rate of speed within the city, and locomotive engines come clearly within the reason and purpose of the ordinance, as much when running alone as when attached to and propelling a train of cars. Besides, the term "cars," in its proper signification, includes many, if not all, classes of vehicles on wheels; and we see no reason why, in its proper generic sense, it may not be held to embrace locomotive engines as a species of cars. We therefore think there was no error in the admission of the ordinance in evidence.

The last point to be noticed relates to the ruling of the court in relation to the conduct of the plaintiff's counsel, in his closing address to the jury. The bill of exceptions recites that in his closing address "the counsel for the plaintiff said in substance that the witness Fries had committed perjury, and had been bribed; and the defendant moved the court to direct said counsel to refrain from any such comments upon said Fries, but the court made no ruling on said motion, and the said counsel then proceeded and repeated such remarks to the jury; and to this action of the court the defendant at the time excepted." Fries had been called as a witness by the plaintiff, and had testified in his behalf, and was afterwards put upon the stand by the defendant, when he gave evidence damaging to the plaintiff. Much of his testimony given for the defendant was disputed by other evidence in the case. While the plaintiff, after putting him upon the stand as his own witness, was not at liberty to introduce evidence tending to directly impeach him, he was at liberty to show that his evidence given for the defendant was in fact untrue, although his so doing might constitute an indirect impeachment, and we see no reason why counsel in his argument was not at liberty to draw any proper and legitimate inferences arising from all the evidence in the case. We cannot say, therefore, that the action of the court in neglecting or declining to restrain remarks of counsel was erroneous.

After giving the record careful consideration, we are able to find no material error, and the judgment of the appellate court will, therefore, be affirmed.

ABEND v. TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

Supreme Court, Illinois, September Term, 1884.

[Reported in 111 Ill. 202.]

EMPLOYEE KILLED IN COLLISION BETWEEN WRECKING TRAIN AND FREIGHT TRAIN — CONTRIBUTORY NEGLIGENCE — RULE OF. —

It cannot be maintained, as a general proposition, that in actions for personal injuries caused by the defendant's negligence, the contributory negligence of the injured party will constitute no defense except when the latter's negligence is an element or factor in producing the force causing the injury complained of. It is sufficient if the plaintiff's negligence

materially contributes to the injury, whether it contributes to the force causing the injury, or not (1).

So ruled in an action by plaintiff, as administrator, to recover damages for death of his intestate, an employee of defendant, who was killed in a collision while on his way to assist in removing a wreck on the track. The evidence reviewed in the case, and held that the deceased was guilty of contributory negligence (2).

WRIT of Error to the Appellate Court for the Fourth District; heard in that court on writ of error to the Circuit Court of St. Clair county. The facts appear in the opinion. *Judgment affirmed.*

JAMES M. DILL, W. H. BENNETT and J. M. FREELS, for plaintiff in error.

JOHN B. BOWMAN, for defendant in error.

Mulkey, J. — This action was brought by Edward Abend, the plaintiff in error, as administrator of Thomas Beasley, against the Terre Haute and Indianapolis Railroad Company, the defendant in error, to recover damages for personal injuries received by the plaintiff's intestate in a railroad collision, resulting in the latter's death, alleged to have been occasioned by the negligence of the company. The cause was tried in the St. Clair Circuit Court, where the action was brought, resulting in a verdict and judgment for the defendant. The judgment having been affirmed by the Appellate Court for the Fourth District, the plaintiff in error brings the record here for review.

On the trial in the Circuit Court, after the evidence on the part of the plaintiff was in, the defendant declined to offer any testimony, and the court, at its instance, instructed the jury to find the issues for the defendant, which it did, and the ruling of the court in thus withdrawing the case from the jury presents the ultimate question for determination.

The circumstances under which Beasley was killed, and which gave rise to the present litigation, are as follows: On the 25th of June, 1880, one of the defendant's trains was wrecked on its road, near Confidence Hill, in Madison county, this State. On the following day the deceased, being an employee of the company, together with a number of others, was ordered by the proper officer of the company to go out from East St. Louis, on

1. The Abend case, while belonging is frequently cited in the Illinois to the topic of Master and Servant, is cases.
reported here because of the ruling on 2. The question of Fellow Servant is Contributory Negligence, which ruling also discussed in the Abend case.

a wrecking train of the defendant, to the place of collision, for the purpose of assisting in removing the wreck, which he proceeded to do. The train was under the control of one Busse, who acted in the capacity both of conductor and engineer. Beasley, instead of taking a seat in the wrecking car, as he should have done, in violation of a published rule of the company of many years' standing, and of which, from the circumstances, he must have had notice, got on the locomotive and took a seat on the fireman's side, immediately in front of Cope, the fireman, the train moving off as he did so, in which position he remained until a short time afterward, when the locomotive upon which he was riding collided with the engine of a freight train coming in the opposite direction, causing his immediate death. The train upon which the deceased was riding was what is known, particularly among railroad men, as a "wild train" — that is, a train not running by schedule, but under special instructions. By the orders delivered to Busse he was expressly directed to keep out of the way of the very train with which his own train collided. This he neglected to do — hence the collision, and the serious consequences resulting therefrom.

The declaration charges, in substance, that Beasley, by order of the company, went aboard the train for the purpose indicated, and that while he was proceeding to the wreck, under the control and management of the servants of the defendant, it came in collision with a freight train belonging to and under the control of the defendant, whereby the said Beasley was instantly killed; that at the time he was so killed he was exercising due care and caution, and that such killing was without any fault or misconduct on his part, and that he was not, at the time in question, a fellow-servant with the servants of the defendant who were operating said train, or either of them; that said Beasley then was, and prior thereto had been, in the employ of the defendant as its head blacksmith, and when so killed he was proceeding to said wreck, by defendant's order, in his capacity as such blacksmith, which is a distinct and different line of employment from that of the other servants of the defendant, etc. These allegations were all traversed by the defendant's plea, and thereby put directly in issue.

The proofs clearly establish most of the issuable facts essential to a recovery. But do they show, or tend to show, the deceased was exercising due care at the time of the collision, or that the

deceased was not at such time a fellow-servant with the servants of the company through whose negligence the collision happened? We are of opinion they do not. It follows, therefore, the trial court ruled properly in withdrawing the case from the jury. What evidence is there in this case tending to show that the deceased was using due care at the time of the accident? None, that we can see. Instead of taking a seat in the wrecking car (the safest and most appropriate place, especially in case of collision or other accident), as he should have done, and, indeed, as he was requested to do, he deliberately, in violation of an express rule of the company, took a seat upon the locomotive, where he was not only exposed to the ordinary dangers incident to that place, but his position even there was rendered extra hazardous by the fireman sitting immediately in his rear, in the small space provided for the fireman only. Situated as the parties were, in case of sudden danger it would, to say the least of it, have been very difficult for him to have made his escape by jumping from the engine, and so it turned out in this instance. Cope, being in the rear, did jump from the locomotive before the collision — Beasley did not. The consequence was, Cope saved his life, while Beasley lost his. Of the entire force, Beasley was the only one killed.

We are of opinion the proofs, so far from showing the deceased was exercising due care when the accident occurred, established beyond controversy he was guilty of such negligence as to absolutely forbid a recovery. Indeed, it does not seem to be seriously contended the deceased was free from negligence, but the contention appears to be that Beasley's death was the immediate result of the collision, and that the negligence of the deceased was not an element or factor in producing the collision, hence it seems to be concluded that however gross his negligence, it cannot affect his right of recovery. This view, plausible as it may appear, is clearly unsound. It cannot be maintained, as a general proposition, that in actions for personal injuries caused by the defendant's negligence, the contributory negligence of the injured party will constitute no defense except when the latter's negligence is an element or factor in producing the force causing the injury complained of. It is sufficient if the plaintiff's negligence materially contributes to the *injury*, whether it contributes to the force causing the injury or not. Whatever *dicta*, or even decisions, may be found to the contrary, the cases fully establish

the rule as here stated. *Galena & Chicago Union R. R. Co. v. Fay*, 16 Ill. 558, 9 Am. Neg. Cas. 215; *Ill. Cent. R. R. Co. v. Buckner*, 28 Ill. 299; *Chicago & Alton R. R. Co. v. Becker*, 76 Ill. 25.

A simple illustration will demonstrate the fallacy of the principle contended for. A party deliberately lies down upon a railroad track where trains of a railroad company are continually passing, and falls asleep. Presently a train comes along at a forbidden rate of speed, and the engineer neglects to ring the bell as required by statute, and the party on the track is injured. In the case supposed it is clear there could be no recovery, and yet the negligence of the party injured did not contribute to the force causing the injury, nor did it have any connection with the negligence of the company in operating its train. It consisted simply, as in the present case, in the injured party placing himself in a dangerous position, but for which the accident would not have happened. The principle deducible from the cases generally is, that if the plaintiff, by the exercise of ordinary care and prudence, could have avoided the consequences of the defendant's negligence, and fails to do so, he cannot recover. Indeed, it is a fundamental principle the plaintiff cannot recover in any case for an injury occasioned by negligence merely, which would have been avoided by the exercise of ordinary care and prudence on the part of the plaintiff himself. Of course, the rule here announced has no application where the element of fraud or intentional injury enters into the case, for however negligent the plaintiff may be, the defendant has no right to practice a fraud upon or wilfully injure him.

But conceding, for the purposes of the argument, the court should not have withdrawn the question of due care of the plaintiff from the jury, we have no hesitancy in saying the case made by the plaintiff was wholly insufficient to warrant a recovery upon the other question, and the case was therefore properly withdrawn from the jury on that ground. *The Cox case*, 21 Ill. 23, *the Keefe case*, 47 Ill. 108, *the Britz case*, 72 Ill. 256, and *the Durkin case*, 76 Ill. 395, all fully sustain the rulings of the court below upon this question. The evidence, construed in the light of these cases, shows beyond all controversy that Beasley was a fellow-servant with Busse, through whose negligence and disobedience of orders the collision was brought about. The evidence shows that a wrecking force is always made up, in the hurry

of the moment, out of the employees and servants of the company who happen to be within convenient reach, without regard to the particular line of service in which they are employed. The removing of obstructions from the tracks in case of a collision is, as shown by the proofs in this case, a distinct branch of service, to which all the laboring force of the company are liable to be called, without any reference to their ordinary calling or duties; and when a force thus made up goes aboard the wrecking train and starts to the scene of disaster, they are all, including conductor, engineer, fireman and brakeman, just as much in a common branch of service while on the way as they are after their arrival and the work of clearing the tracks has actually commenced. It is an error to suppose that a force of men cannot be engaged in a common service unless all are continuously working at the same time and engaged in doing precisely the same kind of work. It is sufficient if all are actually employed by the same master, and that the work of each, whatever it may be, has for its immediate object a common end or purpose, sought to be accomplished by the united efforts of all. The skill of a carpenter, blacksmith or other mechanic, might be very useful in removing a wreck, and when thus working together in such a service, though each one in his own particular way, they are all, within the meaning of the rule, engaged in a common employment, notwithstanding in their ordinary employment they have no connection with each other, and consequently when so engaged are not fellow-servants. The deceased, though not actually using a hammer or other tool at the very moment he was killed, was, nevertheless, just as clearly in the employ of the company for the purposes of the business then in hand as the remainder of the force who actually assisted in removing the wreck. One who is hired by the day, week or year, is just as much in his employer's service in going to and from his work as when actually engaged in the work itself.

Judgment affirmed. SCOTT and DICKEY, JJ., dissented.

NOTES OF ILLINOIS CASES RELATING TO COLLISIONS AND CROSSINGS AND ACCIDENTS ON TRACK.

Among the numerous cases in Illinois, relating to collisions and crossings, etc., not reported, or cited in notes, with the Illinois cases reported in this volume, *ante*, are the following:

COLLISION BETWEEN TRAIN AND BUGGY — FAILURE TO SIGNAL AT CROSSING NOT NEGLIGENCE *PER SE* — INSTRUCTIONS. — In **GALENA & CHICAGO UNION R. R. CO. v. DILL**, 22 Ill. 264 (1859), action for injuries sustained by plaintiff who, while driving across defendant's track was hurt in a collision between train and buggy, judgment for plaintiff for \$12,500 (verdict for \$15,500 was rendered, but plaintiff consented to remit \$3,000) was reversed, it being held that "an authorized proposition to the president of a railroad corporation, that a person injured by a train of the company, should be sent to a hospital, is improper to go to a jury as evidence, in an action by the injured party against the company. An act which exempts a railroad company from ringing a bell or sounding a whistle at a road crossing, is not unconstitutional. An omission to give a signal, by sounding a bell or whistle, is not of itself evidence of negligence. A railroad company, and a traveler on the highway, have correlative rights, and each must use proper caution where there is danger of a conflict. Neither has a superior right, except as it results from the difficulties and necessities of the case."

COLLISION BETWEEN TRAIN AND WAGON — SIGNALS AT STREET CROSSINGS — EVIDENCE. — In **CHICAGO & ALTON R. R. CO. v. GRETZNER**, 46 Ill. 74 (1867), action for injuries received by plaintiff by a collision of defendant's train with plaintiff's wagon, the negligence charged being running of train at too high a rate of speed, and in not having flagman stationed at street crossing where the accident occurred, and in not giving warning of approach of train at such crossing, judgment for plaintiff for \$7,500 was reversed, for erroneous rulings of the trial court in excluding testimony offered by defendants as to duty of engine drivers in observance of signals at street crossings in the city of Chicago, and their application to signals in the city, such testimony being material to defendant's case. The doctrine of comparative negligence was discussed and somewhat modified from previous decisions on that doctrine.

COLLISION BETWEEN WAGON AND TRAIN — CONTRIBUTORY NEGLIGENCE. — In **TOLEDO, PEORIA & WARSAW R'Y CO. v. RILEY**, 47 Ill. 514 (1868), action for injuries sustained by plaintiff while driving across defendant's track and colliding with one of defendant's trains, judgment for plaintiff for \$760 was reversed, it being held that plaintiff, from the evidence, might have seen the approaching train, by the exercise of ordinary care, and have avoided the accident. "While the highway traveler cannot be

required to leave his vehicle, or adopt any other unusual means to discover an approaching train, he cannot be permitted to voluntarily close his eyes to danger, or to rush into it with utter recklessness, and then claim compensation for injury." The evidence was contradictory as to whether signal was given at crossing, but assuming signal was not given, the court was of opinion that the question whether plaintiff's degree of negligence barred recovery should be submitted to another jury.

COLLISION BETWEEN TRAIN AND WAGON AT CROSSING — COMPARATIVE NEGLIGENCE — ERRONEOUS INSTRUCTION. — In *WABASH R'Y CO. v. HENKS*, 91 Ill. 406 (1879), collision between wagon and train at public crossing, judgment for plaintiff for \$4,000 was reversed for erroneous instructions on the question of negligence; citing *Chicago & Alton R. R. Co. v. Murray*, 62 Ill. 326, where it was held that in a case like this, of conflict on the issue of comparative negligence, an improper instruction, ignoring that question, was not cured by others that stated the rule accurately, and the judgment was reversed.

COLLISION BETWEEN VEHICLE AND TRAIN WHILE CROSSING TRACK. — *CHICAGO & ALTON R. R. CO. v. ROBINSON*, 106 Ill. 142 (1883), action for injuries sustained by plaintiff in collision between defendant's train and the vehicle in which she was crossing track; judgment for plaintiff reversed for erroneous instructions.

COLLISION BETWEEN TRAIN AND WAGON AT STREET CROSSING. — *CHICAGO & IOWA R. R. CO. v. LANE*, 130 Ill. 116 (1889), collision between passenger train of defendant's and plaintiff's team and wagon at street crossing; judgment for plaintiff for \$2,500 affirmed.

BOYS KILLED IN COLLISION BETWEEN WAGON AND TRAIN AT CROSSING. — *ILLINOIS CENTRAL R. R. CO. v. SLATER, ADM'R*, 139 Ill. 190 (1891), two boys killed at railroad crossing by passenger train colliding with wagon in which they were riding; separate actions by father to recover damages; judgment in one case for \$1,000, and in the other for \$1,350, affirmed.

COLLISION BETWEEN TRAIN AND WAGON AT CROSSING — RAILROAD NOT LIABLE. — *PARTLOW, ADM'R, v. ILLINOIS CENTRAL R. R. CO.*, 150 Ill. 321 (1894), collision between wagon and team which plaintiff's son was driving and defendant's passenger train, at railroad crossing; death of plaintiff's son; judgment for defendant affirmed, the railroad company not being guilty of negligence or want of ordinary care.

COLLISION AT PRIVATE CROSSING BETWEEN TRAIN AND WAGON. — CHICAGO & ALTON R. R. CO. v. SANDERS, 154 Ill. 531 (1895), collision between train and wagon at private crossing; judgment for plaintiff affirmed; affirming 55 Ill. App. 87.

VEHICLE STALLED ON TRACK — COLLISION — GROSS NEGLIGENCE — RAILROAD LIABLE. — In **CHICAGO & ALTON R. R. CO. v. HOGARTH,** 38 Ill. 370 (1865), judgment for plaintiff for \$800 in action for injuries received in collision between wagon and train, was affirmed, the wagon being stalled on the track, and the engineer, who saw the wagon in time to stop the train to avoid collision, failing to take steps to prevent the accident, such conduct being culpable negligence, for which defendant was liable.

COLLISION BETWEEN STREET CAR AND BUGGY — CONTRIBUTORY NEGLIGENCE. — In **CHICAGO WEST DIVISION R'Y CO. v. BERT,** 69 Ill. 388 (1873), action for injuries received by plaintiff by reason of street car colliding with his buggy, it was held that where the car was seen approaching by plaintiff, it was his duty to turn off the track and thus avoid collision, and where he does not do so the street railroad company is not liable, unless it is wilfully negligent or its conduct is such that plaintiff's negligence is slight compared with that of the company. Judgment for plaintiff reversed.

COLLISION BETWEEN STREET CAR AND BUGGY. — CHICAGO WEST DIVISION R'Y CO. v. INGRAHAM, 131 Ill. 659 (1890), collision between street car and buggy; judgment for plaintiff for \$1,000 affirmed.

TEAM FRIGHTENED AT CROSSING — NOISE OF TRAIN — RAILROAD COMPANY LIABLE. — In **TOLEDO, WABASH & WESTERN R'Y CO. v. HARMON,** 47 Ill. 298 (1868), action for injuries to plaintiff, by the running away of his team caused by an engineer of defendant letting off steam from his engine with a loud noise, just as plaintiff was crossing the track; judgment for plaintiff for \$500 was affirmed.

SHIPPER KILLED IN COLLISION BETWEEN TRAINS. — WABASH, ST. LOUIS & PACIFIC R'Y CO. v. SHACKLET, ADM'X, 105 Ill. 364 (1883), shipper killed in collision between trains; judgment for plaintiff for \$3,500 reversed for erroneous instructions ignoring the issue of contributory negligence.

COLLISION BETWEEN HAND CAR AND TRAIN — CONTRIBUTORY NEGLIGENCE OF INJURED PARTY. — In **BURLING, ADM'X, v. ILLINOIS CENTRAL R. R. CO.,** 85 Ill. 18 (1877), action for wrongful killing of plaintiff's intestate while

attempting to pass over railroad in a hand car, a train being due, judgment for defendant was affirmed, it being held that the deceased was grossly negligent in attempting to ride on the track, he knowing a train was due and the imminent danger of collision, and recovery could not be had even though the railroad company was guilty of gross negligence in running its train without a headlight on a dark night.

See also *Toledo, Wabash & Western R'y Co. v. O'Connor*, Adm'x, 77 Ill. 391 (1875), collision between engine and hand car, whereby plaintiff's intestate was killed, where judgment for plaintiff for \$2,000 was affirmed.

EMPLOYEE OF ONE RAILROAD COMPANY STRUCK BY ENGINE OF ANOTHER COMPANY WHILE CROSSING TRACK. — *ILLINOIS CENTRAL R. R. CO. v. FRELKA*, 110 Ill. 498 (1884), employee of another company crossing track of defendant, struck and injured by defendant's engine, caused by alleged negligence of defendant in operating switch engine; judgment for plaintiff for \$5,000 affirmed.

PERSON STRUCK BY OBJECT THROWN FROM CAR ON TRACK. — In *TOLEDO, WABASH & WESTERN R'Y CO. v. MAINE*, 67 Ill. 298 (1873), judgment for plaintiff for \$235 was affirmed, where it appeared that plaintiff while passing along passenger platform to ascertain departure of train was struck by timber thrown from box car on track, no warning of danger from employees unloading the car having been given.

INTOXICATED PERSON RUN OVER BY TRAIN WHILE CROSSING TRACK — NEGLIGENCE — INSTRUCTION. — In *ILLINOIS CENTRAL R. R. CO. v. HUTCHINSON*, 47 Ill. 408 (1868), action to recover for death of plaintiff's husband, caused by negligent act of defendant in running over him while he was crossing track, judgment for plaintiff was reversed, for error in refusing to charge the jury, on request of defendant, as follows: "If the jury believe, from the evidence, that the deceased, while intoxicated, placed himself, about dark, or in the dusk of the evening, on defendant's track, running along a public street, where defendant's trains were constantly passing and repassing, and so remained there until run over and killed by the passing engine of defendants, then deceased was guilty of such gross negligence that you should find the defendants not guilty; unless you further believe from the evidence that the agent or agents of defendants wilfully caused the death of deceased, or were guilty of such gross neglect on their part as amounts in law to a wilful neglect of duty."

PERSON WALKING ON TRACK AT NIGHT STRUCK BY "DARK TRAIN" — GROSS NEGLIGENCE. — In *INDIANAPOLIS & ST. LOUIS R. R. CO. v. GALBREATH*, 63 Ill. 436 (1872), judgment for plaintiff was affirmed, where it appeared that while plaintiff was walking on the track at night he was struck by a "dark train" running at a high rate of speed, no warning being given of its approach, it being held that plaintiff's negligence was slight compared with the gross negligence of defendant in running its train without giving warning of its approach.

PERSON KILLED BY TRAIN AT CROSSING — FAILURE TO LOOK AND LISTEN — CONTRIBUTORY NEGLIGENCE — FAILURE TO SIGNAL AT CROSSING NOT NEGLIGENCE *PER SE*. — In *CHICAGO, BURLINGTON & QUINCY R. R. CO. v. LEE, ADM'X*, 68 Ill. 576 (1873), action for alleged negligence of plaintiff's intestate at a railroad crossing, where it appeared that the deceased drove upon the crossing without looking for a train, although he could, by the use of ordinary care, have seen an approaching train, and it was not shown that the railroad company's servants saw deceased in time to avoid the collision, it was held that deceased was guilty of gross negligence, and recovery could not be had, even if bell was not rung or whistle not sounded as required by law. Judgment for \$5,000 for plaintiff reversed. (Citing *C. B. & Q. R. R. Co. v. Lee*, 60 Ill. 501; *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 75; *C. B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510; *St. L., A. & T. H. R. R. Co. v. Manly*, 58 Ill. 300; *C. & R. I. R. R. Co. v. McKean*, 40 Ill. 218; actions relating to accidents at crossing).

The cases of *St. L., A. & T. H. R. R. Co. v. Manly*, 58 Ill. 300, and *C. B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510, were stated to be so nearly like the case of *C. B. & Q. R. R. Co. v. Lee*, 68 Ill. 576 (preceding paragraph), in their facts, as to be authorities exactly in point.

The mere omission to ring a bell or sound a whistle, as required by law, will not, *per se*, render a railroad company liable for an accident at a crossing. *C. B. & Q. R. R. Co. v. Lee*, 68 Ill. 576; *C. & R. I. R. R. Co. v. McKean*, 40 Ill. 218.

PERSON KILLED BY TRAIN AT STREET CROSSING — SPEED OF TRAIN — ORDINANCE — SIGNALS — GROSS NEGLIGENCE. — In *ST. LOUIS, VANDALIA & TERRE HAUTE R. R. CO. v. DUNN, ADM'X*, 78 Ill. 197 (1875), action for injuries to plaintiff's intestate, who was struck by defendant's train at a street crossing, judgment for plaintiff was affirmed, it being held that where at the time of the accident the watchman at the crossing

was not attending to his duties, the train was running at a higher rate of speed than allowed by the city ordinance, and there was a question whether bell or whistle was sounded, the omission of any one of these duties would be gross negligence on defendant's part, and would tend to relieve the injured party from the charge of contributory negligence.

PERSON STRUCK BY ENGINE WHILE WALKING ON SIDE TRACK — TRESPASSER — RAILROAD COMPANY NOT LIABLE. — In *AUSTIN, ADM'X v. CHICAGO, ROCK ISLAND & PACIFIC R. R. CO.*, 91 Ill. 35 (1878), person fatally injured by being struck by engine while walking along the side track of defendant's railroad, judgment for defendant was affirmed, the court stating: "This court has repeatedly held that to walk upon the track of a railroad without looking in both directions to discover approaching engines or trains, when the exercise of such precaution would discover either the one or the other, is such negligence as will preclude a recovery, unless the injury be wilfully or wantonly inflicted by the defendant." (Citing *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 82; *C. & N. W. R. R. Co. v. Sweeney*, 52 Ill. 325; *C. B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510; *C. B. & Q. R. R. Co. v. Damerell*, 81 Ill. 450; *C., R. I. & P. R. R. Co. v. Bell*, 70 Ill. 106; *L. S. & M. S. R. R. Co. v. Hart*, 87 Ill. 529; *Ill. Cent. R. R. Co. v. Hall*, 72 Ill. 222; *Ill. Cent. R. R. Co. v. Hetherington*, 83 Ill. 510; the majority of which cases will be found reported or cited in notes with the Illinois cases in 11 AM. NEG. CAS.)

PERSON KILLED AT RAILROAD CROSSING. — CHICAGO, BURLINGTON & QUINCY R. R. CO. v. PERKINS, ADM'R, 125 Ill. 127 (1888), person killed at railroad crossing; judgment for plaintiff affirmed.

PERSON KILLED BY TRAIN — SPEED OF TRAIN. — CHICAGO & NORTHWESTERN R'Y CO. v. DUNLEAVY, ADM'X, 129 Ill. 132 (1889), person on track killed by defendant's train which was running at high rate of speed in populous part of city; judgment for plaintiff for \$1,800 affirmed.

PERSON RUN OVER BY TRAIN AT STREET CROSSING — RAILROAD LIABLE. — CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS R'Y CO. v. BADDELEY, ADM'R, 150 Ill. 328 (1894), action to recover damages for death of plaintiff's intestate, caused by being run over at street crossing by defendant's engine, which was alleged to be running at a speed greater than allowed by city ordinance; judgment for plaintiff for \$2,500 affirmed.

BOY PLAYING ON TRACK RUN OVER BY FREIGHT CAR — RAILROAD COMPANY NOT LIABLE. — In **CHICAGO & ALTON R. R. CO. v. McLAUGHLIN**, 47 Ill. 265 (1868), action for damages for injury to boy who was playing on track and was run over by freight car, it was held that "where a freight car is standing upon a railroad track, separate from any other car or engine, and the yardmaster mounts the car to loosen the brakes, it is not his duty to give any signal before the brakes are loosed, lest the car might move, when he has no reason to suppose any person would be endangered thereby, although, when he mounted the car, there were boys near the car, beside the track." *Held*, also, that where there was no omission of duty on part of defendant's servants, or wrongful act on their part, the railroad company was not liable for injury to a boy who was playing on defendant's track, and judgment for plaintiff was reversed.

CHILD ON RAILROAD TRACK RUN OVER AND INJURED BY TRAIN — IMPUTED NEGLIGENCE — INSTRUCTION — FLAGMEN AT CROSSINGS — TRESPASSERS. — In **CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. v. EININGER**, 114 Ill. 79 (1885), appeal from judgment for plaintiff in the Superior Court of Cook county, and the Appellate Court for the First District, **SHELDON, J.**, stated the facts as follows: "The accident occurred at about four o'clock in the afternoon in the city of Chicago. The train causing the injury was a freight train. The claim of the declaration is that the plaintiff received his injury while, with all due care, he was walking along Twenty-fourth street, at a crossing of the same and the railroad track of the defendants. The defendants insist that the plaintiff was attempting, wrongfully, to climb upon the train, and slipped under one of the cars, thus receiving his injury, his leg being run over and broken. The tracks run north and south. Twenty-fourth street runs east and west. The train was running south. The undisputed evidence shows that the plaintiff went upon the private right of way of defendants at Polk street, a considerable distance north of Twenty-fourth street, and walked south from Polk street along the track to near Twenty-fourth street; that he lived still further south, and was walking in a southerly direction." Judgment for plaintiff reversed for erroneous instructions on the question of imputed negligence and duty of railway to keep flagman at crossing. *Held*, error, to instruct that "if the jury believe, from the evidence in this case, that the plaintiff was, at the time and place when the alleged injury is in the declaration alleged to have occurred, of such tender age, and was so immature, that the requisite capacity to exercise proper care was wanting, then the law

will not impute negligence to him; " there being no evidence as to age or capacity or discretion of plaintiff, more than that witnesses spoke of him as a little boy. He was present at the trial and appeared to be of such age and ability to care for himself as to be intrusted by his parents to attend school at a considerable distance from home, going and returning by himself. As to flagman at crossing, the court said that plaintiff was not a lawful traveler upon the highway, and to such a one the railroad company does not owe the duty in respect to a flagman." " Flagmen are for the protection of persons crossing railroad tracks, and are not for the benefit of persons walking along and upon a railroad track, employing it as a footpath."

BOY STRUCK BY TRAIN WHILE WALKING ON TRACK — TRESPASSER — DUTY OF RAILROAD COMPANY. — In *WABASH R. R. CO. v. JONES*, 163 Ill. 167 (1896), it appeared that plaintiff, a boy about nine years of age, was injured by defendant's train while walking on the track in front of the train, and recovered judgment in the Circuit Court of Sangamon county, which was affirmed in the Appellate Court for the Third District. The Supreme Court reversed the judgments, holding that where the complaint charged that defendant's engineer saw plaintiff, a trespasser on defendant's track, and wantonly ran over him, it was immaterial whether the engineer had or had not reason to believe that a person might be using defendant's right of way, in so far as it affected plaintiff's right to recover. But Magruder, Ch. J., dissented from this view, stating: " To say that, where the engineer of a railroad company is charged with recklessly and wantonly running over a person whom he sees upon the track it is immaterial whether such engineer ' had or had not reason to suppose that some person might be using the track as a path,' is to announce a doctrine which is as much opposed to sound principles of law as it is to enlightened sentiments of humanity." Judgment reversed (53 Ill. App. 125, reversed).

See also *ILL. CENT. R. R. Co. v. GODFREY*, 71 Ill. 500 (trespasser injured on track); *ILL. CENT. R. R. Co. v. HETHERINGTON*, 83 Ill. 510 (killed by train while walking on railroad company's right of way); *BLANCHARD v. LAKE SHORE & MICHIGAN SO. R'y Co.*, 126 Ill. 416 (person killed while trying to cross railroad tracks where there was no street crossing); *ILL. CENT. R. R. Co. v. NOBLE*, 142 Ill. 578 (injury to trespassing animals).

CHILD STEPPING ON CINDERS AT SIDE OF TRACK, RUN OVER AND KILLED BY TRAIN. — CHICAGO & ALTON R. R. CO. v. NELSON, ADM'R, 153 Ill. 89 (1894), child falling under and killed by moving train, caused by stepping on pile of ashes and cinders placed on public street at side of track by defendant's employees; judgment for plaintiff for \$1,500 affirmed.

Among the numerous cases in the *Illinois Appellate Courts*, relating to COLLISIONS AND CROSSINGS (many of which are affirmed or reversed in the Illinois Supreme Court, as indicated in the Illinois decisions reported in this volume, *ante*), are the following:

Passenger injured in collision between trains — Joint tort feasons — Release. — In *CHAPIN v. CHICAGO & EASTERN ILLINOIS R. R. Co.*, 18 Ill. App. 47 (1885), an action for injuries to plaintiff, a passenger on a train of another railroad caused by a collision between said train and defendant's freight train, where the question turned on the liability of joint tort feasons, the court held that whether plaintiff could have maintained a joint action or not, a release to one of the companies discharged both; judgment for defendant in the Circuit Court of Vermilion county, affirmed.

Collision between team and wagon and train at crossing — Contributory negligence — *CHICAGO, B. & Q. R. R. Co. v. FLORENS*, 32 Ill. App. 365 (1889), team injured in collision with train at crossing; judgment for plaintiff for \$110 in Circuit Court of Fulton county, reversed, the court holding plaintiff negligent in failing to look for trains before driving on the track.

Driving over defective track — Duty of railroad — Erroneous instruction. — *ILLINOIS CENTRAL R. R. Co. v. TRUESDELL*, 68 Ill. App. 324 (1896), person thrown from wagon while crossing track due to defective track; judgment for plaintiff for \$3,000 in Circuit Court of Iroquois county, reversed for erroneous instructions as to duty of railroad company to keep all of its right of way free from obstructions, it being only required to keep that part within approaches to its track in safe condition for travelers.

Collision between wagon and horse car — Negligence — Erroneous instructions. — *REND ET AL. v. CHICAGO WEST DIVISION R'y Co.*, 8 Ill. App. 517 (1881), collision between a loaded wagon and a horse car; railway company recovered judgment in the Circuit Court of Cook county for \$2,000; on appeal judgment reversed for erroneous instructions that jury must find whether the injury was wholly the result of negligence of either of the parties, as the injury may have been the result of the joint negligence of both, and in that case verdict should be for defendants. See former decision in same case, reversing judgment for defendants, 6 Ill. App. 243.

Collision between wagon and street car. — *CHICAGO CITY R'y Co. v. BRADY*, 35 Ill. App. 460 (1890), collision between wagon and street car, injuring driver of wagon; judgment for plaintiff in Circuit Court of Cook county affirmed.

Person struck by cars in railroad yard at street crossing. — CHICAGO, ALTON & ST. LOUIS R. R. Co. v. GOMES, 46 Ill. App. 255 (1892), person injured by box cars in railroad yard at point where it was crossed by public street on which plaintiff was walking at time of accident; judgment for plaintiff for \$1,800 in the Circuit Court of Sangamon county affirmed.

Person crossing track failing to look and listen for trains — Contributory negligence. — CHICAGO, B. & Q. R. R. Co. v. THORSON, 68 Ill. App. 288 (1896), person injured while crossing track; judgment for plaintiff for \$5,000 in Circuit Court of La Salle county reversed, the court, in its finding of facts, stating "We find that appellee [plaintiff] was injured through her own negligence and want of due care for her own safety, and not in consequence of any negligence on the part of appellant [defendant] or its employees." Plaintiff appears to have gone on the crossing without looking or listening or trying by any means to find out whether a train was approaching or whether it was safe to attempt to cross the track.

Person killed while crossing track — Contributory negligence — Trespasser. — CHICAGO, ROCK ISLAND & PACIFIC R'y Co. v. BEDNORZ, ADM'R, 57 Ill. App. 309 (1894), plaintiff's intestate killed by train while crossing track; judgment for plaintiff in Circuit Court of Cook county reversed, the court holding that negligence of deceased contributed to his injury. It was held that the liability of railroad companies for injuries to trespassers upon their right of way is confined to such injuries as are wilfully, intentionally or wantonly inflicted.

Person struck by train while crossing track to board train. — CHICAGO, ST. PAUL & KANSAS CITY R'y Co. v. RYAN, 62 Ill. App. 264 (1895), person struck by train while crossing track to board train; judgment for plaintiff for \$6,000 in Circuit Court of Cook county affirmed. See note of the Ryan case in 9 Am. Neg. Cas. 266, incorporated with notes of other cases in the Illinois Appellate courts, relating to persons injured by trains at stations, etc.

PITTSBURGH, CINCINNATI AND ST. LOUIS
RAILROAD COMPANY v. SPENCER ET AL.

Supreme Court, Indiana, May Term, 1884.

[Reported in 98 Ind. 186.]

PASSENGER INJURED IN COLLISION BETWEEN TRAINS — PLEADING — NEGLIGENCE. — A complaint in an action for injuries sustained by a passenger in a collision, which does not allege that the negligence of the railroad company on whose train plaintiff was a passenger did not contribute to the injury is not open to objection on that ground, as a passenger who is himself without fault is entitled to recover for injuries inflicted through the negligence of another railroad company in running into the train of the company that had undertaken to carry him, even though the latter company has been guilty of negligence(1).

SPECIAL VERDICT — FACTS MUST BE FOUND. — A special verdict finding that the injury to plaintiff was caused by defendant's train being backed down upon another car "by the carelessness, negligence and fault of the defendant," is bad, as such verdict does not find facts so that the court can declare negligence to exist as matter of law. One whose right to a recovery depends on negligence must secure a special verdict stating facts which the court in pronouncing the law can declare to constitute negligence.

SPECIAL VERDICT — FACTS ONLY FOR JURY. — In a special verdict the jury consider the facts only, leaving the law wholly and exclusively to the court.

FROM the White Circuit Court. The facts are stated in the opinion. *Judgment reversed.*

N. O. ROSS and G. E. ROSS, for appellant.

R. GREGORY, for appellees.

Elliott, Ch. J. — The complaint seeks the recovery of damages for injuries received by Lilla E. Spencer.

The only objection urged to the complaint which is not founded upon a misconception of its language is, that it is bad because there is no allegation that the negligence of the railroad company on whose train Mrs. Spencer was a passenger did not contribute to the injury, and this objection is not well founded. A passenger who is himself without fault is entitled to recover for injuries inflicted through the negligence of another railroad company in running into the train of the company that has undertaken to carry him, even though the latter company has

1. For other actions relating to Passengers Injured in Collisions, see vols. 9 and 10 AM. NEG. CAS.

been guilty of negligence. The authorities are full and satisfactory upon this point. *Town of Albion v. Hetrick*, 90 Ind. 545; *Robinson v. New York Central, etc., R. R. Co.*, 66 N. Y. 11; *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341 (1); *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628; *Wylde v. Northern R. R. Co.*, 53 N. Y. 156, 5 Am. Neg. Cas. 189; *Bennett v. New Jersey R. R. & T. Co.*, 7 Vr. (N. J.) 225, 9 Am. Neg. Cas. 575; *Danville, etc., R. R. Co. v. Stewart*, 2 Met. (Ky.) 119; *Steamer New Philadelphia*, 1 Black, 62; *Thompson Carriers*, 284.

The verdict in this case was a special one, and all that is stated in it upon the subject of the appellant's negligence is contained in the specification which reads thus: "We, the jury, find that on the 10th day of December, 1881, Lilla E. Spencer was a passenger on a train of the Indianapolis and Chicago Air Line Railway Company, and that the road of said company passes through White county, Indiana, and crosses the railroad track of the Pittsburgh, Cincinnati and St. Louis Railway Company, the defendant herein, at right angles, in the town of Monticello; that while said Air Line train was passing over and across said crossing the train of said Pittsburgh, Cincinnati and St. Louis Railway Company backed down upon the car in which said Lilla E. Spencer was sitting as a passenger, and upset said car, injuring her; that there was no fault on the part of Lilla E. Spencer, nor on the part of the Indianapolis and Chicago Air Line Company, but that said car of the Air Line Company was upset, and the injuries to said Lilla E. Spencer caused by the carelessness, negligence and fault of the defendant."

"The design of a special verdict," said the court, in *Goldsby v. Robertson*, 1 Blackf. 246, "is to exhibit the facts of the case in such a manner that the court can decide according to law, and relieve the jury from the necessity of deciding legal questions, on which they may have doubts." In a text-book of excellent standing it is said: "A special verdict which does not find the material facts in detail cannot be supported as such; it must be set aside, and a new trial awarded." 3 *Graham & Waterman, New Trials*, 1418. There are many cases in our reports sustaining this doctrine, *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 433. The Code declares that "a special verdict is that by which the jury find the facts only, leaving judgment

1. See note of *Chapman* case, with other New York cases in 9 Am. Neg. Cas. 618.

thereon to the court." Sec. 545, R. S. 1881. Facts only are to be found, and not matters of law. All the facts essential to a recovery must be found, and mere conclusions of law are disregarded. *Dixon v. Duke, supra*; 2 Tidd's Pr. 897, auth. n.

The question in this case is whether the special verdict does find the facts that the court can declare the law, for if it does not it is bad. The facts, so far as the controlling issue of negligence or no negligence is concerned, and the only facts, stated in the verdict, are, that the train of the appellant was backed down upon the car of the Air Line Company, and that the car was passing over the crossing of the two roads. If it can be decided as matter of law that the bare fact of backing into another train constitutes negligence, then the verdict may be sustained, but we are satisfied that this cannot be held. It may be perfectly proper to back a train, and from that fact alone negligence cannot be declared to exist as matter of law. Nor from the fact that a collision occurred can negligence be adjudged to exist, for a collision may occur through the tort of a stranger, through unavoidable accident, or from some cause for which the carrier is not answerable. One whose right to a recovery depends on negligence must secure a special verdict stating facts which the court in pronouncing the law can declare to constitute negligence. The jury have nothing at all to do with the law in cases where they return a special verdict, but they must state the facts so fully that the court can, in a case like this, declare that the law is, that such facts constitute actionable negligence. It is not sufficient to state facts not in themselves constituting negligence and then by an epithet or conclusion of law characterize them as negligent, but the facts must be so stated as to afford the court grounds for adjudging that the law is that they do constitute negligence. Supposing that an action is brought for injuries received by a collision on a highway crossing, would a verdict be good which simply found that the railway train backed into the wagon? Or, suppose the collision to be between two wagons at the crossing of the highways, would it be sufficient to find that the defendant backed into the plaintiff's wagon? Again, suppose the verdict in a case against a municipal corporation to find that there was an excavation in a public street, would that finding be enough to authorize the court to declare as matter of law that there was negligence? It seems quite clear that in all these cases the verdict would be insufficient, and in principle they are

the same as the case in hand. Upon principle and authority no special verdict can be good in a case where negligence is the material issue, without stating such facts as in law constitute negligence.

Conclusions of law in a special verdict are without force, and a general statement that an act was negligently done is but a conclusion of law. The facts showing how the act was done are essential, for without them the court cannot ascertain or pronounce the law. All the authorities agree that the law is exclusively for the court in cases where special verdicts are returned, but if it be held that a general statement of negligence is good, then nothing at all is left to the court, for the jury have determined both the law and the facts. To allow this would be to permit the jury to usurp the functions of the court and decide the whole case. In that event the court would be without power and without functions, and this surely cannot be the law. If the jury's decision, stated in general terms, that an act is negligent, is sufficient, then what need for a court? All that would be necessary, if that were the law, would be to make a special verdict embodying the jury's opinion. Something is to be done by the court in every case of a special verdict, and that something is to declare the law upon the facts found; but if we hold that the jury's general statement that an act was negligent is sufficient, we affirm the converse of this, because, by so holding, we declare that the verdict of the jury settles everything, the law as well as the facts, leaving the court nothing to do except make the mere formal entry of judgment.

We understand it to be a fixed principle that the court does rule upon all questions of negligence. If it were otherwise there would be no element of law in such a case; everything would be pure matter of fact; nothing would be matter of law. It would be strange indeed if in any case a judgment could be had without the application of rules of law, and in all civil cases the law comes from the court. It has been said scores and scores of times that negligence is generally a mixed question of law and fact, and it has been often said that where the facts are undisputed, and the inferences to be drawn from them unequivocal, it may be a question of law. *Gagg v. Vetter*, 41 Ind. 228, *vide* authorities, p. 254; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Ohio, etc., R'y Co. v. Collarn*, 73 Ind. 261; *Pitts. Cin. & St. L. R. R. Co.*

v. Williams, 74 Ind. 462 (1); *Louisville, etc., R'y Co. v. Richardson*, 66 Ind. 43; *Binford v. Johnston*, 82 Ind. 426, see page 431; *Woodruff, etc., Co. v. Diehl*, 84 Ind. 474 (43 Am. R. 102); *Purcell v. English*, 86 Ind. 34; *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274. If it be true, as undeniably it is, that the question is always either one of law, or one of mixed law and fact, then it must be true that in all cases the court must pronounce the law. In the case of a special verdict it is only possible to do this by acting upon the facts stated in the verdict.

Where a general verdict is sought, the court instructs the jury as to the law of negligence, and thus pronounces the law of the case; but in cases where a special verdict is asked the law is pronounced, not in instructions to the jury, but upon the facts stated by the jury. If the jury for themselves state the law, then the court is a mere passive spectator, at most a mere moderator. In general verdicts the law enters as a factor, because the jury are required to decide the case "according to the law and the evidence;" but in special verdicts they simply state the facts. It is clear that unless all the material facts are stated in the special verdict the court cannot declare the law, and the result is that the law is not declared at all, or is declared by the jury.

We have said that when the facts are found the legal character and consequences are matters of law for the court, and we now give our authority for this statement. In a recent work it is said: "And though negligence is generally a mixed question of law and of fact, yet when the fact from the existence of which it is claimed that the negligence flows is found by the jury to be true, then its legal character and the consequences flowing therefrom become a matter of law for the court." 2 *Rorer Railroads*, 1030. Many cases are cited in support of this proposition, and our own cases lay down this rule.

In the case of *Bellefontaine R'y Co. v. Hunter*, 33 Ind. 335, it was said: "But while negligence is, in general, a mixed issue of law and fact, yet it is equally true that when the fact which it is claimed constitutes negligence is found its legal character and consequences become a matter of law." In *Woodruff, etc., Co. v. Diehl*, 84 Ind. 474, *Howk, J.*, said: "In the case at bar the facts were very fully found by the court, and the necessary

1. There is a note of the *Williams* case in 9 AM. NEG. CAS. 289.

inference therefrom of the appellant's negligence was so plain and certain that the court was authorized, we think, to state such negligence as a conclusion of law."

The question came even more directly before the court in Toledo, etc., R. Co. v. Goddard, 25 Ind. 185 (1), where the following interrogatories were submitted to the jury and the following answers returned:

" 'Was not the defendant guilty of negligence in placing the freight car on the side-track, on the street, thereby obstructing the same?' To which the jury answered 'yes.'

" 'Was not the defendant guilty of negligence in not placing some visible signal at or near the southwest corner of the woodshed to indicate the approach of the backing train, to prevent collision?' To which the jury answered 'yes.' " The court said: "These interrogatories, we think, should not have been submitted to the jury. The answers to them do not constitute a special verdict under the statute. They were probably intended to be submitted under the last clause of section 336 of the Code, 2 G. & H. 205, which provides that the court, 'in all cases when requested by either party, shall instruct the jury, if they render a general verdict, to find specially upon particular *questions of fact*, to be stated in writing, which special finding is to be recorded with the verdict. These interrogatories do not conform to the statute. They do not ask the jury to find upon any particular questions of fact; they simply assume that certain facts existed, and ask the jury if they do not constitute negligence.

"The question of negligence is ordinarily a mixed one of law and fact, but when the facts are found, then their legal consequences constitute purely a question of law for the court, and not for the jury. If the jury had been asked to find specially whether the defendant had placed a freight car on the side-track on the street, thereby obstructing the same; and whether the company had placed a visible signal at or near the southwest corner of the woodshed to indicate the approach of the backing train, to prevent collision, and the jury had answered the first in the affirmative, and the second in the negative, these would have been facts specially found by the jury, and then it would have devolved upon the court to determine, as a question of law, whether the facts so found by the jury constituted such negligence as to make the defendant liable for the injury complained of."

1. See abstracts of the Hunter and Goddard cases, among the Indiana cases in this volume, *post*.

If we extract from the special verdict the conclusion of law, there remains nothing from which it can be concluded as matter of law that there was actionable negligence. There is no fact stated which will authorize the court to make the conclusion which the jury, by usurping the functions of the court, arrived at; on the contrary, the act done, for aught that appears, might have been done without culpable negligence.

It is one of the oldest principles of the law that it is of the very essence of a special verdict that it state all of the material facts, and that the court will supply nothing by intendment. 2 Tidd Pr. 897, auth. n; *Seward v. Jackson*, 8 Cowen, 406; *Hill v. Covell*, 1 N. Y. 522; *Langley v. Warner*, 3 N. Y. 327; *Eisemann v. Swan*, 6 Bosw. 616; *Hallett v. Jenks*, 1 Caines Cas. 43; *Thayer v. Society, etc.*, 20 Pa. St. 60; *Kuhlman v. Medlinka*, 29 Tex. 385. The Code has not changed the rule upon this subject. *Williams v. Willis*, 7 Abb. Pr. 90; *Eisemann v. Swan*, *supra*.

It is important that a special verdict should state the material facts in detail for still another reason than those already stated, and that reason is, that where a special verdict is returned no interrogatories can be propounded to the jury. If, therefore, the party cannot get the facts fully on the record by a special verdict, he cannot get them at all, and the result would be a denial of an important right. In the present case there are no more facts in the special verdict than would be implicitly contained in a general verdict, for every general verdict in a case of negligence passes upon and implicitly embodies a decision of that question. If it be true that the general verdict implicitly contains a conclusion on this question, then it must be true that a special verdict which does no more than give expression to that conclusion is in legal effect only a general verdict, and surely no special verdict can be good which, in effect, is nothing more than a general verdict. In a general verdict the jury take the law as declared by the court and apply it to the facts and state their conclusion upon the law and the evidence in a general way; while in a special verdict they consider only the facts, leaving the law wholly and exclusively to the court. If it be said that in a general verdict the jury do not pass upon the law as contained in the instructions of the court, then it must be held, in order to be consistent, that instructing the jury is a meaningless ceremony and the oath to "find according to the law and the evidence" an empty form.

There may possibly be cases in which it is necessary for the jury to make an inference from the facts characterizing the act as negligence, but that is not the question here. The question here is whether, if the act done is in itself not a wrongful or negligent one, it is sufficient by a mere conclusion to characterize it as negligent without stating the manner in which it was performed, or the circumstances surrounding its performance. The naked statement that a train was backed down upon another train standing upon the crossing, without stating how it was done, or under what circumstances it was done, simply informs the court that it was done. This it does, and nothing more; and if the act was not in itself negligent, or if there are no facts stated as to the manner of its performance, there is absolutely nothing upon which the court can base a legal conclusion. An act may or may not be negligent; whether it is so or not, in many cases, depends upon the circumstances under which it is done, as is well illustrated by the case of Pittsburgh, etc., R. R. Co. v. Evans, 53 Pa. St. 250, where it was said: "Negligence is generally a mixed question of law and fact, and what renders special verdicts proper in these railroad cases is, that if they ascertain all the material facts, the undisputed as well as the disputed, the question of negligence then becomes exclusively a question of law, and may be dealt with accordingly." In that case the verdict was held to be insufficient, because, although it stated "that plaintiff passed on to the railroad track, exercising the care that a prudent man would exercise under similar circumstances," it did not state facts enough to enable the court to decide that he was not guilty of contributory negligence. If it were conceded that the jury should characterize an act not leading directly to the inference of negligence as negligent, still it would not conflict with the views here expressed by us, for what we decide is that where an act is not in itself negligent or wrongful, it cannot, as a legal conclusion, be adjudged to constitute negligence where there are no facts stated showing the manner in which it was done, or the circumstances under which it was performed. In our opinion an act in itself wrongful or negligent cannot, in the absence of facts or circumstances giving it that character, be declared to constitute actionable negligence.

Judgment reversed, with instructions to sustain appellant's motion for a *venire de novo*.

GRAND RAPIDS AND INDIANA RAILROAD COMPANY v. ELLISON.

Supreme Court, Indiana, November Term, 1888.

[Reported in 117 Ind. 234.]

COMPLAINT — AMENDMENT — PRACTICE. — Permission to file an amended complaint is within the discretion of the trial court, and where the record shows no abuse of such discretion, there is no available error on its refusal to strike out such amended complaint.

GENERAL VERDICT — SPECIAL FINDING. — If there is any reasonable hypothesis whereby the general verdict and the special finding can be reconciled judgment must follow the general verdict.

PASSENGER ON TRAIN NOT BOUND TO WARN RAILROAD EMPLOYEES OF IMPENDING DANGER. — A passenger who sees a train approaching a crossing is not bound to pull the bell rope or signal the engineer of the train on which he was traveling of the approaching danger, it being no part of his province to interfere in any way in the management of the train, and failure to so signal is not contributory negligence.

PASSENGER INJURED IN COLLISION AT CROSSING — NEGLIGENCE OF WATCHMAN — RAILROAD LIABLE. — It is no defense to an action for damages for injuries to a passenger caused by negligence of defendant's watchman at a railroad crossing, that defendant had no knowledge of the incompetency of its watchman until after the accident, as being an employee of defendant it was responsible for his negligence whether he was or was not a competent watchman (1).

CARRIER AND PASSENGER — DEGREE OF CARE. — A passenger is entitled to safe transit, and a carrier is bound to the highest degree of reasonable care.

DUTY OF FIREMAN AT CROSSING. — It is the duty of a fireman, when his train is in motion, and especially when nearing a railroad crossing, to be at his post and on the look out.

DUTY OF ENGINEER TO STOP AT CROSSING. — It is the duty of an engineer, when approaching a crossing, to bring his train to a full stop, and ascertain whether any train is approaching before moving his train across.

FROM the Allen Superior Court. The facts are stated in the opinion. *Judgment affirmed.*

A. A. CHAPIN and W. S. O'ROURKE, for appellant.

L. M. MINDE, J. MORRIS and J. M. BARRETT, for appellee.

1. *Collision.* — See Ind. & Cin. R. and Lawrenceburg & Upper Miss. R. Co. v. Rutherford, 29 Ind. 82, 9 R. Co. v. Montgomery, 7 Ind. 474, 9 Am. Neg. Cas. 273, where passenger's arm protruding out of car window came into collision with object near track; Am. Neg. Cas. 279 n, where person traveling on gravel train was injured in collision.

Berkshire, J. — The appellee brought this action against the appellant to recover damages for injuries to his person, which he avers he sustained, without fault on his part, while a passenger on one of the appellant's trains, because of the negligence of its servants and employees.

The appellant answered the complaint by filing a general denial.

The case was tried by a jury and a general verdict returned for the plaintiff, assessing his damages at \$500. The jury also returned into court with their general verdict, certain interrogatories, which had been submitted to them, and their answers to the said interrogatories.

The appellant moved the court for judgment on the answers to the interrogatories, notwithstanding the general verdict; this motion the court overruled. The appellant then moved for a new trial, and this motion was overruled, and judgment rendered on the general verdict for the appellee for the damages assessed and for costs.

The errors assigned by the appellant are: 1. Error of the court in overruling its motion to strike the amended complaint from the files. 2. Error of the court in overruling the demurrer to the amended complaint. 3. Error of the court in overruling the motion for judgment, notwithstanding the general verdict. 4. Error of the court in overruling the motion for a new trial.

Granting to the appellee permission to file an amended complaint was within the discretionary powers of the court, and, as the record shows no abuse of discretion, there is no available error because of the action of the court in this regard. Sec. 391, R. S. 1881; *Durham v. Fechheimer*, 67 Ind. 35; *Child v. Swain*, 69 Ind. 230; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Dewey v. State, ex rel.*, 91 Ind. 173.

The second assigned error, that the court erred in overruling the demurrer to the complaint, is not discussed by counsel for appellant and is, therefore, waived.

The third alleged error, the overruling of the motion for judgment *non obstante veredicto*, is earnestly discussed.

In this State it is well settled that if there is any reasonable hypothesis whereby the general verdict and the special finding can be reconciled, judgment must follow the general verdict. *Redelsheimer v. Miller*, 107 Ind. 485; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460.

The answer to interrogatory 21 is in conflict with the answer

to interrogatory 36. The former is, that the engineer of the New York, Chicago and St. Louis R. R. Co. did not wickedly and recklessly so run his engine as to cause the collision. The latter answer is that the wicked and reckless conduct of the said engineer was the primary and proximate cause of the collision.

The one neutralizes the other, but if this were not so, the latter answer states a mere legal conclusion.

In determining whether the answers which the jury return to the interrogatories are to control the general verdict, they must be treated as a special verdict, and therefore the jury must return the facts, from which the court will draw the conclusions of law.

The answers to interrogatories 39 and 40 find that the appellee saw the engine of the N. Y., C. and St. L. R. R. Co. approaching the crossing; that thereafter he could have pulled the bell-rope and signaled appellant's engineer of the approaching danger, and, had he done this, the engineer would have received warning in time to have stopped the train and avoided the accident.

The appellee was not bound to do this. As a passenger it was no part of his province to interfere in any way in the management of the train. Counsel for the appellant cite us to no authority in support of their contention to the contrary.

The answers to interrogatories 5, 7 and 8 find that by virtue of a contract between the N. Y., C. and St. L. R. R. Co. and the appellant the former employed a watchman to manage the signals and regulate the passage of engines and trains over the crossing where the accident occurred; that if the signals and rules adopted by said companies had been observed and obeyed, the accident would not have happened; that the N. Y., C. and St. L. R. R. Co. paid the watchman.

The answer to interrogatory 6 is, that before the accident the officers and managers of the appellant company had no knowledge of the incompetency of the watchman.

If the watchman was incompetent and his incompetence contributed to the injury, it is wholly immaterial as to whether the appellant's officers and managers were or were not informed thereof. He was an employee of the appellant, and it was responsible for his negligence, whether he was or was not a competent watchman.

The answers to interrogatories 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 22 only go to show that the engineer of the N. Y., C. & St. L. R. R. Co. was guilty of negligence; they do not

exclude the idea of negligence on the part of the appellant's employees.

The answers to interrogatories 1 and 2 find that the appellee was a passenger on a train of cars owned and being run by the appellants, on the morning of December 24th, 1883, and while being thus carried the accident complained of happened, at the crossing of the N. Y., C. and St. L. R. R. Co.'s railroad and the railroad of the appellant.

The appellee, as a passenger, was entitled to a safe transit, and the appellant was bound to the highest degree of reasonable care. *Gaynor v. Old Colony & Newport R'y Co.*, 100 Mass. 208 (1); *Cleveland, Col. Cin. & Ind. R. R. Co. v. Newell*, 104 Ind. 264 (2); *Bedford, Springfield, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551, 9 Am. Neg. Cas. 277; *Wood Railway Law*, p. 1076, note 2; *Pitts. Cin. & St. Louis R. R. Co. v. Williams*, 74 Ind. 462 (3).

The answers to interrogatories 3, 4, 23, 24, 25, 26, 28, 30, 31, 32, 33, 34, 35 and 38, find that there had been erected, at the crossing where the accident occurred, some years before, a target, upon the top of which were suspended red and white balls, to be used as signals in regulating the passage of trains; that it had been mutually agreed between the two companies that when a white ball was displayed on said target, the appellant's engines and trains had the exclusive right to pass over said crossing; that the engineer of the appellant's train brought his engine and train to a full stop 700 feet south of the said crossing before attempting to pass over it; that, after bringing his train to a full stop, he rang the bell and sounded the whistle of his engine, and obtained the white ball signal for his train to pass over the crossing before again putting his train in motion; that, after receiving the signal, the appellant's engine and train had the exclusive right of passage over said crossing to and including the time at which the accident occurred; that, after advancing with his train a distance of 200 feet, the engineer of appellant's train stepped over to the west side of his engine and looked out on the track of the N. Y., C. and St. L. R. R. Co.'s railroad to ascertain if there was any danger from that direction; that, on the east side of the appellant's railroad, approaching from the south, the view

1. See note of the *Gaynor* case, in 9 Am. Neg. Cas. 439.

2. Note of the *Newell* case appears in 9 Am. Neg. Cas. 289.

3. There is a note of the *Williams* case in 9 Am. Neg. Cas. 289.

from the appellant's engine was obstructed to a point within 250 feet of the crossing; that the side-tracks, engine-house and Fort Wayne station of the N. Y., C. and St. L. R. R. Co. were east, and within one mile of said crossing; that more care was required to avoid approaching engines that might be on that company's railroad from the east than from the west side; that for the safe and proper management of his train, it was necessary that the appellant's engineer should remain on the east side of his engine as he approached the crossing; that it was necessary for the appellant's engineer, as he approached the crossing with his train, to look to the east for approaching trains of the N. Y., C. and St. L. R. R. Co.'s railroad; that, when standing at his post on the east side of his engine, the view of the appellant's engineer of the railroad of the N. Y., C. and St. L. R. R. Co. westward was obstructed until his train arrived at the crossing; that the appellant's engineer had no information that the engine colliding with his train was nearing the crossing; that the engineer and servants of the appellant obeyed the rules and signals adopted for the passage of engines and trains over the said crossing.

These facts are not inconsistent with negligence on the part of the employees of the appellant, contributing directly to the accident.

It is a fact well known that all engines hauling passenger and freight trains carry a fireman as well as an engineer, and when the engine is in motion the post of the fireman is on the left side of the cab, and that of the engineer on the right.

If there was a fireman on the appellant's engine on the morning of the accident, it was his duty when his train was in motion, and especially so when nearing a railroad crossing, to be at his post and on the lookout.

It is evident from the answers to the interrogatories that, had the fireman been at his post in the performance of duty, he could and would have observed the approaching engine on the other road, and informed the engineer in time for him to have stopped the train and prevented the accident.

This state of facts we must assume in considering this motion. But this is not all.

The answers to the interrogatories show that the appellant's engineer stopped his engine 700 feet from the crossing, and then started on, not stopping again until the accident occurred.

This was not only negligence, but the grossest kind of

negligence. It was the duty of the engineer to move his train to a point near the crossing and bring it to a full stop, and then ascertain whether there was a train on the other railroad in sight or approaching said crossing; if not, then he had the right to move his train across, otherwise it was his duty to hold his train until he could pass over in safety. Section 2172, R. S. 1881.

Had the engineer done his duty in this particular, it is very clear the accident would not have happened.

The speed at which the appellant's train approached the crossing is not given in the answers of the jury. For the purpose of this motion we may assume that its speed was at least the ordinary speed at which passenger trains are moved. But, without any presumption, the failure of the engineer to stop his engine near the crossing and to inform himself whether or not there were approaching trains or engines on the other railroad, and in the vicinity of the crossing, was gross negligence, contributing directly and proximately to the injury.

The answers to interrogatories 28 and 34 seem to be inconsistent.

The answer to 28 is, that on the west side of the appellant's engine, approaching from the south, the view of the other railroad track was obstructed to a point within 250 feet of the crossing; the answer to 34 is, that the view was obstructed to the crossing.

If the view was obstructed, then there was a greater necessity for stopping the train at the crossing or near thereto before attempting to pass over it.

The answer to the twenty-sixth interrogatory finds that appellant's engineer, when within 500 feet of the crossing, passed over to the west side of his engine and looked out on the railroad of the New York, Chicago and St. Louis Railroad Company to see if there was any danger; the answer to interrogatory 27 finds that there was an approaching engine on the other railroad at that very time.

A very significant circumstance in this connection is, that the jury do not find whether the engineer saw the approaching engine or not.

The court below was clearly right in overruling the motion for a judgment upon the answers to the interrogatories.

This leads us to the error assigned because of the overruling of the appellant's motion for a new trial.

The third reason for a new trial is, that the court refused to permit the appellant to ask Patrick O'Rourke, a witness, the following question

“ Mr. O'Rourke, suppose that an engineer in charge of a passenger train stops at a distance of 695 feet from the railroad crossing, where the target crossing is in full view, comes to a full stop, whistles for the signal, obtains the signal which gives him the right to pass over the crossing; that at that point there is a cut which prevents his seeing any great distance upon either side of the track that he is on; that he then starts up his engine at the rate of between six and eight miles an hour; when he gets 200 feet nearer to the crossing he comes out of the cut so that he could see on the west (if he is going north); he then steps across to the left-hand side and looks to the west; he could see 400 or 500 feet to the west; there is no engine in sight approaching the crossing upon the other track; upon the right-hand side the view is obstructed for 200 feet farther, so that he could not see the track east; as he steps back to his post on the right-hand side to his throttle valve and apparatus with which he manages his engine, and when he gets 200 feet further he looks to the east to see if there is any danger there, discovers none, and during all this time he keeps the target in full view; a signal has been given which gives him the right to cross, a watchman being at the target; he then drives his engine on to the crossing. I would ask you whether, under such circumstances, you would say that an engineer was acting within the line of his duty under such circumstances ? ”

This was clearly an improper question, and the court did right in refusing to allow the witness to answer it.

It is sufficient to say that, as to whether the engineer was acting in the line of his duty on the occasion in question, was a question to be determined by the jury from the facts proven, and not from the opinions of witnesses given upon a supposable state of facts.

The sixth reason for a new trial is the giving of instructions 1 and 2, requested by the appellee.

These instructions are long, and we do not, therefore, set them out in this opinion.

We have carefully examined them and are satisfied that they state the law correctly as to the duties and responsibilities of railroad companies as carriers of passengers.

The court followed the well considered cases in this court of *Pitts. Cin. & St. Louis R. R. Co. v. Williams, supra*; *Bedford, Springfield, etc., R. R. Co. v. Rainbolt, supra*; *Cleveland, Col. Cin. & Ind. R. R. Co. v. Newell, supra*.

We are of the opinion that the instructions were applicable to the case made by the evidence.

The seventh reason for a new trial is, that the court erred in refusing to give instruction 3, requested by the appellant. As this instruction is short, we set it out:

"3. If you find that the plaintiff was injured through the negligence of any one or more of the employees of what has been called the Nickel Plate Railroad Company, and that said employee or employees were not in the employment of the defendant nor under its control, and that the defendant's servants had no reasonable cause, under all the circumstances, to anticipate that the said employees of the Nickel Plate Company would be negligent, and that defendant's employees acted reasonably prudent themselves as soon as they became aware of the impending danger to avoid the same, then your verdict should be for the defendant."

This instruction was properly refused. It asks the court to say to the jury that if the appellant's employees were reasonably prudent after they discovered impending danger, the verdict of the jury should be for the appellant, though the negligence of the said employees may have contributed directly to bring about the danger that was impending.

But again, the instruction was not applicable to the case as made by the evidence.

There is a further reason why the judgment should be affirmed. The record shows that substantial justice has been done.

As the foregoing are the only reasons for a new trial discussed by counsel for appellant, we do not notice the others.

We find no error in the record for which the judgment should be reversed. The judgment is affirmed, with costs.

OHIO AND MISSISSIPPI RAILROAD COMPANY v. DAVIS.

Supreme Court, Indiana, November Term, 1864.

[Reported in 23 Ind. 553.]

COLLISION BETWEEN TRAIN AND WAGON AT RAILROAD CROSSING — RAILROAD IN POSSESSION OF RECEIVER — EVIDENCE — RAILROAD NOT LIABLE FOR ACT OF SERVANT OF RECEIVER. — In an action to recover damages for injuries sustained by plaintiff, in collision of rolling stock of defendant which was under the management of the defendant, with the cattle and carriage of plaintiff as he was crossing track, the defendant offered evidence for the purpose of showing, under the general denial, that at the time of the committing of the alleged grievances, the railroad was not in its possession, or in any manner under its control; that it did not employ, pay, or in any manner control the hands, servants or agents engaged upon the road in the running of trains, or in any other capacity, and that the servants who were charged with having committed such injury were not the servants of the defendant company, or in any manner under its control, but that the railroad and all its appurtenances were in the exclusive possession, use and control of a receiver appointed by the United States Circuit Court for the District of Indiana, and that he had the employment and control of all the hands, agents and servants engaged upon the railroad or its business; which evidence the trial court refused to admit. *Held*, that such evidence was relevant and material, and it was error to refuse its admission. *Held*, also, that a railroad company cannot be held liable for the act of any servant of a receiver appointed by the court. *Held*, also, that the possession of the receiver cannot be regarded as the possession of the railroad company.

APPEAL from the Orange Circuit Court. The facts appear in the opinion. *Judgment reversed.*

THEODORE GAZLAY, CARTER GAZLAY and MALOTT & COBB, for appellant.

JAMES COLLINS and GIDEON PUTNAM, for appellee.

Ray, Ch. J. — This action was originally brought by the appellee in the Lawrence Circuit Court to recover damages for injuries sustained by him, resulting, it is alleged, from a collision with rolling stock of the appellant, under the management of her hands. The complaint avers "that he (appellee) was passing the track of said road with necessary care, at the usual and known place of crossing, and while he was passing said track the said defendant, with carelessness and with gross negligence, and without giving any warning whatever, caused one of her engines to run upon said track with great speed, and without any signal

whatever, and the said appellee being on such track, crossing the same with his cattle and carriage, and said engine, so carelessly and without signal run as aforesaid, was caused to come into collision, etc., and without any fault on his part; whereby," etc.

The action was subsequently transferred, upon the affidavit and motion of appellant, to the Orange Circuit Court. To the complaint a demurrer was filed, which was overruled by the court, and an exception reserved.

It is insisted that negligence is not sufficiently charged against the appellant. In our opinion the ruling of the court upon the demurrer was right. The charge is, that the appellant ran the train with carelessness and with gross negligence. Answers were filed in several paragraphs, among which was the general denial. The bill of exceptions shows that, on the trial of the cause, the appellant offered in evidence a transcript of a record of the United States Circuit Court for the District of Indiana, and the depositions of Theodore Gazlay and Alexander H. Lewis, all of which were so offered for the purpose of showing under the general denial, that at the time of the committing of the alleged grievances, the appellant's railroad was not in her possession, or in any manner under her control; that she did not employ, pay, or in any manner control the hands, servants, or agents engaged upon the road in the running of trains, or in any other capacity, and that the servants who are charged with having committed said injury were not the servants of the company, or in any manner under her control; but the railroad and all its appurtenances and dependencies were in the exclusive possession, use, and control of one Joseph W. Alsop, a receiver appointed by the United States Circuit Court for the District of Indiana, and that he had the employment and control of all the hands, agents, and servants engaged upon the railroad or about the business thereof.

The appellee objected to the introduction of this evidence, on the ground that it was irrelevant and immaterial, and the court sustained the objection.

The complaint charges that the injury to the appellee resulted from the gross negligence of the appellant, in the management of the train. This was a material averment, and, unless sustained by proof, the plaintiff below cannot recover in this cause.

The action is for damages resulting from the negligent act of a corporation; but the corporation could do no act save by its agents and servants, and proof which tended to show that the

persons who committed the wrong were not the agents or employees of the corporation, would seem to be relevant and material.

This court held, in the case of *Crockett v. Calvert*, 8 Ind. 127, where A hired his wagon, team, and teamster to B, and during the bailment the team ran away, and ran against C's horse, injuring him so that he died, that the teamster was the servant of the bailor and not of the bailee, and the bailor was the party liable for the injury. The decision rested upon the authority of *Quarman v. Burnett et al.*, 6 M. & W. 497, in which case Baron Parke, in delivering the opinion of the court, makes use of the following language:

"Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stands in the relation of master to the wrongdoer; he who selected him as his servant, from the knowledge or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey. And no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of, and his act the act of, another." This case overruled *Bush v. Steinman*, 1 Bos. & Pull. 404, which has never been recognized as authority in this State.

The above decision was fully approved and the same principles recognized in the cases of *Rapson v. Cubitt*, 9 M. & W. 710; *Hobbitt v. L. & N. W. R'y Co.*, 4 W. H. & G. 254; *Reedie v. L. & N. W. R'y Co.*, 4 Exch. 244; *Knight v. Fox*, 5 Exch. 721; *Overton v. Freeman*, 11 C. B. 867; *Peachey v. Rowland*, 13 C. B. 182; *Sadler v. Henlock*, 30 Eng. L. & Eq. 167; *Steel v. S. E. R'y Co.*, 32 Eng. L. & Eq. 367; *Scott v. Mayor, etc.*, 38 Eng. L. & Eq. 477 (1).

1. In *Shearman & Redfield on Neg.*, § 173 (5th ed.), referring to liability of owner for persons employed on land, it is said: "There is nothing in the nature of real property which requires that its owner should be held to a stricter liability than the owner of personal property; and he is not, therefore, responsible for the negligence of persons employed upon his land, any further than he would be if they were employed about his chattels. Many

attempts have been made to establish such a distinction, and to make the owner of land responsible for the misuse of his property by contractors and their servants; and for a long time the courts gave it a certain recognition; but, on more thorough consideration, they repudiated it altogether." In a note to this section the learned authors say: "The history of the decisions and *dicta* upon this point is worth reviewing. The distinction seems to

The rule, so well considered and clearly established in England, has been followed very generally in this country. The case of *Blake v. Ferris*, 1 Seld. (N. Y.) 48, applies the rule, where certain persons were permitted to construct a public sewer at their own expense, and employed another person to do it at an agreed price for the whole work, they were held not liable for injury resulting from the negligence of the contractors. The same court have again recognized the rule in *Stevens v. Armstrong*, 2 Seld. (N. Y.) 435; *City of Buffalo v. Holloway*, 3 Seld. (N. Y.) 493; *Pack v. Mayor, etc.*, 4 Seld. (N. Y.) 222; *Kelly v. Mayor, etc.*, 1 Kern. (N. Y.) 432; *O'Rourke v. Hart*, 7 Bosw. (N. Y.) 511. The Supreme Court of Massachusetts, in the case of *Hilliard v. Richardson*, 3 Gray, 349, after a careful review of the decisions, announce the law as thus settled by the weight of authority.

The decision in *De Forest v. Wright*, 2 Mich. 368, is to the same effect. This also in the case of *City of Cincinnati v. Stone*,

have been first suggested by Eyre, Ch. J., in *Bush v. Steinman*, 1 Bos. & P. 404. The other judges did not put their decisions upon that ground. In *Laugher v. Pointer* (1826), 5 Barn. & C. 547, the court was equally divided upon the question whether the rule in *Bush v. Steinman* should apply to owners of movable property, and the judges who held that it should not, relied much upon this distinction. In *Quarman v. Burnett* (1840), 6 Mees. & W. 499, the court said *Bush v. Steinman* could not be supported on any other ground, but intimated it might well stand upon this. The same opinion was expressed in *Rapson v. Cubitt* (1842), 9 Mees. & W. 710. In *Milligan v. Wedge* (1840), 12 Ad. & El. 737, the validity of this distinction was doubted, and in *Allen v. Hayward* (1845), 7 Q. B. 960, it was practically denied; but it was not until 1849 that it was finally passed upon. It was then overruled, in *Reedie v. N. W. R. Co.*, 4 Exch. 244, and again, in *Overton v. Freeman* (1851), 11 C. B. 867, which was decided in the same court which decided *Bush v. Steinman*. In *Gayford v. Nichols*

(1854), 9 Exch. 702, *Bush v. Steinman* was again cited and overruled, and since that time we cannot find that it has ever been quoted as an authority in England." The learned authors cite the American authorities following the rule, several of which are cited in the opinion in the case at bar.

The facts in the English cases cited in the opinion in the case at bar are as follows:

In *Rapson v. Cubitt*, 9 M. & W. 710, it appeared that a builder was employed by a committee of a club to execute alterations at the clubhouse, including the preparation and fixing of gas-fittings. He made a subcontract with B., a gas-fitter, to execute this part of the work. In the course of doing it, through B.'s negligence, the gas exploded, and injured the plaintiff. *Held*, that the builder was not liable for this injury.

In *Reedie v. London & Northwestern R'y Co.*, 4 Exch. 244, a railway company contracted, under seal, with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing

Ohio (N. S.) 38; the same ruling was had in the case of *Painter v. City of Pittsburg*, reported in *Am. Law Reg.*, 1864, p. 350.

In the case of *Althorf, Adm'r, et al. v. Wolfe*, 22 N. Y. 355, it was held that while the owner of fixed property is in general responsible, that it be so used as that others receive no injury, still he may absolve himself under some exception, as that the offender was there despite of due care to exclude negligent persons, by superior force, or in the employment of a third person having temporary control. That the same rule holds in regard to real and personal property was decided in *Reedie v. London & N. W. R'y Co.*, 4 Exch. 244 (*supra*), and *Simons v. Monier*, 29 Barb. 419, except perhaps in the single instance where the act complained of in regard to real estate amounts to a nuisance.

In *Weyant v. New York & Harlem R. R. Co.*, 3 Duer (N. Y.) 360, the rule was applied to a case somewhat analogous to the one now under consideration. "Weyant was thrown out of his wagon and injured in Canal street by a car which belonged to

any of the contractor's workmen for incompetency. The workmen in constructing a bridge over a public highway negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. *Held*, that the company was not liable, and that in such case the terms of the contract in question did not make any difference.

In *Knight v. Fox*, 5 Exch. 721, it appeared that a railway company entered into a contract with A. to construct a branch line, who contracted with B. to erect a tubular bridge, parcel of the works. B. had a surveyor, C., whom he paid by a salary of £250 a year to attend to his general business, and after obtaining the contract for the bridge, contracted with C. to provide the necessary scaffolding, for which he was to receive £40, irrespective of his salary, B. to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers-by, D. stumbled over the pole and was injured, subsequently to which additional

lights were placed on the spot, and B. paid for them. *Held*, that B. was not liable, and that D.'s remedy lay against C.

In *Overton v. Freeman*, 11 C. B. 867, the defendants were employed to pave a district by A. They contracted with B. to pave one of the streets. B.'s workmen, in the course of paving the street, left some stones at night in such a position as to constitute a public nuisance, and the plaintiff was injured by falling over those stones. No personal interference of the defendant with, or sanction of the work of, laying down the stones was proved. *Held*, that the defendants were not liable.

In *Peachey v. Rowland*, 13 C. B. 182, it appeared that the defendants employed A. for a sum of money to fill in the earth over a drain constructed for them across a highway, from their house to the common sewer, the defendants finding the carts, if necessary, to remove the surplus earth, which were to be filled by A. A. filled in the earth, but left it so heaped above the level of the road that, there being neither light nor signal, the plaintiff at

the New Haven Railroad Company, but the horses which drew it, and the driver who was driving it, were in the employ of the defendants, The Harlem Railroad Company. The sole question which arose was, whether the Harlem Railroad Company or the New Haven Railroad Company was liable." It was held that the Harlem Railroad Company was liable. In *Fletcher v. Boston & Maine R. R.*, 1 Allen (Mass.) 9, the court held the railroad company responsible for an injury occasioned by a want of proper care and prudence on the part of its servants in the management of a train which was under their exclusive care and control although the trains belonged to another company and decided that it was immaterial who in fact were the owners of the engine and cars constituting the train. "This must be so for if a wrong was done it was by those who had the exclusive direction and control of the train at the time, and no others." It was also

night drove his carriage against it, and sustained injury therefrom. The only evidence of interference or control on the part of the defendants was, that one of them, a few days before the accident, and when the work was incomplete, had seen the earth heaped over a part of the drain as it afterwards remained. *Held*, that there was no evidence of their liability, for that the wrong complained of was a public nuisance by A., which the defendants (whether A. was their servant or only a contractor) had not authorized him to commit, having merely directed generally the doing of an act which might have been done without committing a public nuisance. *S. P., Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767.

In *Sadler v. Henlock*, 30 Eng. L. & Eq. 167, 4 El. & Bl. 570, 24 L. J. Q. B. 138, the defendant employed P. to clean out a drain which was on the defendant's land. P. was not in the defendant's service, but was a common laborer, selected by the defendant on account of his having dug the drain originally. P. cleaned out the drain without assistance from any other person, and without the further direction or inspection of the defendant. He

received five shillings for the job from the defendant. In the course of cleaning out the drain, P. took up part of an adjoining highway and replaced the same in an improper manner and with insufficient materials, in consequence of which the plaintiff's horse, passing along the highway, was injured. *Held*, that under these circumstances P. was not an independent contractor, but was acting as the servant and under the control of the defendant, and consequently that the defendant was responsible for the injury.

In *Steel v. South Eastern R'y Co.*, 32 Eng. L. & Eq. 367, 16 C. B. 550, it was held that where work is done for a company under a contract (parol or otherwise), the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though the company employs their own surveyor to superintend it, and to direct what shall be done.

In *Scott v. Manchester (Mayor, etc.)*, 38 Eng. L. & Eq. 477, 1 H. & N. 59, affirmed on appeal, 2 H. & N. 204, it was held that a municipal corporation employing workmen to lay down gas pipes in the borough is responsible for the negligence of the persons employed.

decided in that case " that if such injury results from the negligence of another railroad company which has a joint right with the defendants to use the defendant's track, *under a lease from the defendants*, and which is accordingly running trains over the defendant's road on its own account, the defendants are not responsible in this action." This decision of a court of eminent judicial learning is entitled to grave consideration.

The ruling of the Supreme Court of Vermont, in *Felton v. Deall*, 22 Vt. 170, has been repeatedly relied upon in later cases in other States. There the defendant, being the owner of a farm and ferry, leased them by parol to one H., for the term of one year, upon certain conditions, among which it was provided that the profits and proceeds of the farm should be divided equally between the defendant and the lessee; that the lessee should keep and manage the ferry at his own expense and labor, the defendant to put the boat in good order at the commencement of navigation, and the expense of subsequent repairs to be borne one-half by the defendant and one-half by the lessee; that the lessee should pay to the defendant, one-half of the receipts of the ferry weekly, during the continuance of the lease; that the lessee was to conduct all his business as such tenant, and to manage the said " farm and premises " so leased to him, in a careful, prudent, and husbandlike manner, and was to allow no one but a suitable man to attend the ferry, and was to be responsible to the defendant for " damages occasioned by willful misconduct or neglect in the management of the said farm and premises, and in the management of the said ferry, and the said scow and boat ; " that court held " that by this agreement H. became tenant of the defendant, both of the farm and ferry, and that the defendant was not responsible for the negligence of H. in so managing the ferry that damage had accrued to the person and property of a passenger in the boat. "

In Alabama, an action was brought against the licensee of a ferry. He had given the bond required by law. The suit was brought to recover the value of a wagon and horses which had been lost in crossing the ferry. It was proved, on the part of the defendant, that at the time of the loss the ferry was in the possession of a lessee, to whom it had been rented by the defendant, and who was entitled to the ferriage. By a statute of Alabama, it was declared that no person should open or establish a public ferry without license, and a bond and security as

prescribed. Yet it was held that the action would not lie against the lessor of the ferry, for the reason that the tenant of the ferry was not his servant. *Ladd v. Chotard*, 1 Ala. 366.

The Supreme Court of New York approve and apply the law as stated in this last case, in *Blackwell, Adm'r, v. Wiswall*, 24 Barb. 355; and they held also "that, although, as between the defendant and the government, the defendant might have been guilty of a breach of duty when he made the contract to lease the ferry to another, yet that such breach was not *per se* a wrongful act, for which an action would lie in favor of a stranger; that it would still be necessary to show, in order to maintain an action founded upon the mere fact that the defendant had thus leased the ferry, that by this very act he had been guilty of a wrong which had resulted in injury to the plaintiff." The same court held "that the lessor of a ferry is not liable for the torts of the lessee or his servants. The doctrine of *respondeat superior* cannot apply, as the relation between lessor and lessee is not that of partners, nor master and servant, nor agency." *Norton v. Wiswall*, 26 Barb. 618.

In a recent case an application of the law theretofore announced in that court has been made which, unless disregarded by us, must be decisive of the question under consideration: "Where D. and M. had an absolute contract with a railroad company to draw its cars over a certain portion of the road, to furnish the horses and drivers for that purpose, and to assume the entire control of the work," it was held "that, while D. and M. were in the performance of this contract, the railroad company could not be made liable for the negligent acts of D. and M.'s employees." *Schular v. Hudson River R. R. Co.*, 38 Barb. 653.

We are satisfied, from the consideration of the authorities cited, that the evidence offered by the defendant in this case was material, and relevant to the issue. While we are not required to determine that a corporation which has received special powers and privileges from the legislature, and assumed certain duties and liabilities to the public, may, while retaining her charter franchise, relieve herself from her liabilities by a lease of her road to other parties, we regard it as very clear, upon principle, that she cannot be held liable for the act of any servant of a receiver appointed by the court.

It may be argued that the possession of the lessee is but to the public, that of the lessor. The possession of the receiver cannot,

however, be regarded as the possession of the railroad company, but is in every view antagonistic thereto. "The receiver is under the control of the court that appointed him, and his possession is the possession of the court." *Angel v. Smith*, 9 Ves. 335 (1); *Wiswall v. Sampson*, 14 How. 52. The acts of the receiver are not the acts of the corporation, nor can she control either the receiver or his employees. An attempt to exercise such authority would be resisted by the courts. It would be a severe rule which would render the railroad company responsible for the negligence of the agent of the court that had deprived her of the possession and enjoyment of her road bed, track, and equipments. We have been referred to no decision, and are aware of no principle of law which would impose such a liability. The case of *Ohio & Miss. R. R. Co. v. Fitch*, 20 Ind. 498, while doubtless regarded as controlling the ruling of the court below in this case, has since then been fully explained, upon all points in which the opinion therein rendered can be regarded as authority, by the later decision of this court, in *McKenney v. Ohio & Miss. R. R. Co.*, 22 Ind. 99. The liability imposed in the cases cited from our reports are statutory, and did not arise from the negligent act of the servants of the corporation, and the rule *respondeat superior* could have no application.

It cannot be insisted that any special hardship results to the appellee from this ruling, for it must not be assumed that a party who suffers from the negligent act of the servants of a receiver is without remedy. The court cannot permit her possession to result in wrong to one without fault, but, upon sufficient proof, will grant the relief to which the sufferer may be entitled. To that forum his petition should be addressed.

As the application of the principle we have considered to the case of a corporation whose property is in the possession of a receiver involves important consequences, and the question is before the court for the first time, we have felt it proper to press the examination of authorities beyond the limits of the decisions with which counsel have favored us, and have therefore reviewed at some length the application of the rule to the various cases presented in other courts.

The evidence offered in the case not in judgment being relevant was clearly admissible under the general denial, as it tended

1. In *Angel v. Smith*, 9 Ves. 335, it was held that where a receiver is in possession, an ejectment cannot be brought without leave of the court.

to controvert a material allegation of the complaint. 2 G. & H. 113, sec. 91; *Schular v. Hudson River R. R. Co.*, *supra*; *Hart v. New Orleans & Carrollton R. R. Co.*, 4 La. Ann. 261.

For the error in excluding the evidence offered by appellant, and in overruling the motion for a new trial, this cause is reversed at the costs of the appellee, and remanded for further proceedings, in accordance with this opinion.

COLLISION BETWEEN WAGON AND FREIGHT TRAIN AT CROSSING — CONTRIBUTORY NEGLIGENCE. — In **INDIANA, BLOOMINGTON & WESTERN R'Y CO. v. HAMMOCK**, 113 Ind. 1 (1887), collision between freight train and wagon at railroad crossing, judgment for plaintiff for \$800 was reversed. The court (per MITCHELL, Ch. J.), stated the facts as follows: "Oliver Hammock and his son-in-law, David Bolen, while going north over a public highway standing in an open two-horse wagon, came in collision with a west-bound freight train at the highway crossing of the appellant company's line. Both were thrown from the wagon; Bolen was killed, and the appellee sustained serious bodily injury. This occurred between 9 and 10 o'clock A. M. of September 15, 1884. In an action to recover damages for the alleged negligence of the railway company, in failing to give the signals required by law, and for running its train at an alleged immoderate rate of speed, the plaintiff had a verdict and judgment for eight hundred dollars. So far as appears from the evidence in the record, there does not seem to have been any delinquency imputable to the railway company, unless it was the failure of those in charge of its train to give the signals required by statute upon approaching the highway crossing. Upon that subject the witnesses are in irreconcilable conflict. All those connected with the running of the train, and two or three others wholly disinterested, testify affirmatively and positively that the whistle was sounded at the required distance from the crossing, while others testify with equal assurance that it was not sounded until it was too late to avoid the collision which followed immediately. Fully recognizing the rule, applicable to the issue involved, that affirmative evidence that an act was performed, or that a particular thing did occur, is entitled to more weight than merely negative evidence upon the same subject (*Stitt v. Huidekopers*, 17 Wall. 384; *Steves v. Oswego, etc., R. R. Co.*, 18 N. Y. 422; *Wharton Neg.*, sec. 806), we are nevertheless of opinion that the finding of the jury in respect to the failure of the railway company to give the signals required, cannot be said to be so far without support in the evidence as to justify a reversal under

the rule which governs in this court. Conceding, therefore, that the railway company was derelict in its duty in the respect mentioned, it was necessary, before the plaintiff was entitled to recover, that it should have appeared that the injury complained of resulted from the neglect of the company, and not from any negligence of the plaintiff which materially contributed thereto. As was said, in effect, in *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31: If the plaintiff's negligence contributed to the accident, then the injury was not, in contemplation of law, caused by the defendant's negligence. There is no presumption that a person injured on a highway and railroad crossing, with which he was familiar, was himself free from negligence. *Prima facie*, the fault was his own, and it is, therefore, essential that the proof should show that the plaintiff was himself in the exercise of due care. *Indiana, etc., R'y Co. v. Greene*, 106 Ind. 279, and cases cited; *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Toledo, etc., R'y Co. v. Brannagan*, 75 Ind. 490; *City of Warsaw v. Dunlap*, 112 Ind. 576. The evidence shows, without substantial contradiction, that the plaintiff was familiar with the crossing; that he and his son-in-law were proceeding along a public highway in a two-horse wagon, going in a northerly direction. Looking to the east, the railroad track was in plain sight of travelers going northward on the highway for a distance of from 1,000 to 1,500 feet, until a point about ten rods distant from the crossing was reached. Then for a distance of seven rods the view of the road to the east was obstructed by a farm-house and farm buildings. For the last three rods before going upon the track, the railway track was visible to a person looking to the east for a distance of eighty rods at least. The plaintiff testified that he looked to the east, but that when he looked, the approaching train was so near upon the wagon that he saw no means of escape. The conclusion is, therefore, irresistible that the plaintiff neglected to look to the east until the team and wagon had substantially reached the railroad track. All of the witnesses say the railway track was visible from the highway for a distance of eighty rods to the east, all the way from a point three rods distant from the track, and many of them affirm that it could have been seen without material hindrance at any time after reaching a point seventy feet from the track. It is, therefore, certain that if the plaintiff had looked to the east when he reached a point fifty feet from the track, he would have seen the approaching train in time to have avoided the accident. This being so, the failure of the railway company to perform its statutory duty was not, in legal contemplation, the efficient cause of the injury.

* * * The evidence tends to show that the railroad track was

elevated several feet above the level of the highway, so that there could have been no difficulty in halting the team before making the ascent, if attention had been given to the situation. *Salter v. Utica, etc., R. R. Co.*, 88 N. Y. 42; 2 Wood Railway Law, 1302-1304. Persons who could have avoided injury by exercising the opportunity to look for an approaching train will be regarded as having made the attempt to cross after having seen the train approach. The evidence does not sustain the verdict." Judgment reversed. C. W. FAIRBANKS, O. GRESHAM, J. S. NEW, J. W. JONES, C. L. HENRY and H. C. RYAN, appeared for appellant; C. S. HERNLY and S. H. BROWN, for appellee.

INJURY AT RAILROAD CROSSING WHILE DRIVING — PRESUMPTION OF NEGLIGENCE — RULE — EVIDENCE. — In *TERRE HAUTE & INDIANAPOLIS R. R. CO. v. CLEM*, 123 Ind. 15 (1889), action for damages for injury to plaintiff's horse while driving over a crossing, the theory being that defendant was negligent in constructing a crossing at a point where its railroad crossed a public road and that the injury was caused by defendant's negligent breach of duty, ELLIOTT, J., said: "It is quite well settled that it is the duty of a railroad corporation to so construct and maintain its crossings that they may be safely used by persons traveling the highway, and that for a negligent breach of this duty it must answer in damages to one who exercises ordinary care and sustains an injury from the breach of duty by the company. *Evansville, etc., R. R. Co. v. Crist*, 116 Ind. 446; *Evansville, etc., R. R. Co. v. Carvener*, 113 Ind. 51; *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143. The appellee's counsel are in error in assuming that the same rule applies to actions for the recovery of injuries received at a crossing that applies in cases where passengers are injured while on the trains of the carrier. The presumption of negligence which prevails in such cases does not obtain in such a case as this, and the cases of *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264, 9 Am. Neg. Cas. 289 n, and *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 347, 3 Am. Neg. Cas. 148, are not in point. The evidence upon the question of negligence in this instance is not of that satisfactory character which authorizes us to declare that the judgment should be affirmed, although incompetent evidence was admitted. If, therefore, we find that incompetent evidence was permitted to go to the jury over the objection of the defendant, we must reverse the judgment. The appellee was permitted to prove that after the accident occurred the appellant changed and repaired the crossing. This was error. Evidence of repairs made after an injury has been

sustained is incompetent to show antecedent negligence (citing authorities). * * * The rule stated and enforced in the cases referred to is the only one that can be defended on principle. To declare the evidence competent is to offer an inducement to omit the use of such care as the new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents. The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs he does it under penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. If it is competent, then it would be the duty of the court to charge the jury that they must regard the making of subsequent repairs as evidence of antecedent negligence; and this, certainly, would violate settled principles, for it is what occurs prior to the action, and not what happened afterwards, that determines whether there has or has not been a culpable breach of duty. If, for example, the owner of a mill, or factory, repairs or improves it after an accident has happened, so as to prevent the possibility of future accidents, the just inference is, not that he was previously guilty of negligence, but that, prompted by humane motives, and influenced by the new information supplied by the fact that an accident has happened, he has exerted extraordinary care, and taken such precautionary measures as render it impossible that any one should be injured in the future. It is unjustly reversing the presumptions to hold that such an owner improves, or repairs, because he was, at some time anterior to the time of making the improvements or repairs, guilty of an actionable wrong. True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting by experience, and availing themselves of new information has nothing to commend it, for it is neither expedient nor just. Accidents do happen, despite the utmost care and diligence; but, with very rare exceptions, the happening of an accident does not of itself supply grounds for inferring negligence. It is common knowledge that accidents occur which even the highest degree of care can neither anticipate nor prevent; but, in cases where an extraordinary accident happens, which ordinary prudence could not have foreseen, or anticipated, neither a natural nor an artificial person is liable. *Wabash, etc., R'y Co. v. Locke*, 112 Ind. 404. The law does not, as a general rule, require any one to exercise extraordinary care or vigilance. The question in this case, and

in all others like it, is, whether the defendant, prior to the accident, used due care, and whether due care was, or was not used, must be determined by the precedent facts and attendant circumstances, not from what subsequently occurs. If a person does all that is reasonable under the facts as they exist, and are known at the time of the injury, or at some antecedent time, he is not a wrongdoer, for no one is bound to anticipate and provide against unusual and unexpected accidents. * * * The fact that the happening of an accident may convey information producing a conviction or belief that had extraordinary precaution been taken the injury would have been prevented, does not legitimately tend to prove that ordinary care and vigilance were not exercised. All may be done that ordinary care required, and yet a person satisfied by experience that a higher degree of care may insure absolute safety, may employ extraordinary means to prevent accidents in the future. In doing this he does what is commendable, and certainly he ought not to be restrained or checked by the fear that if he does resort to unusual means to insure safety, he may be treated as one who confesses that he was a wrongdoer when the accident occurred. It is unjustly burdening one who, influenced by the light supplied by events, resorts to greater precautions to insure the safety of others. * * * Judgment for plaintiff reversed. W. H. RUSSELL, F. F. MOORE, J. G. WILLIAMS and S. O. BAYLESS, appeared for appellant; L. D. BOYD and L. G. BECK, for appellee.

MANN V. BELT RAILROAD AND STOCK YARD COMPANY.

Supreme Court, Indiana, November Term, 1890.

[Reported in 128 Ind. 138.]

PERSON APPROACHING RAILROAD CROSSING — DUTY TO LOOK AND LISTEN. — The presence of a railroad track upon which a train may at any time pass is notice of danger, and it is the duty of a person about to cross such road, on a public highway, to exercise caution in so doing, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution. Mental absorption, or reverie, induced by grief or business, will not excuse the omission of the duty to look and listen.

ACCIDENT AT RAILROAD CROSSING — COLLISION OF TRAIN WITH VEHICLE — CONTRIBUTORY NEGLIGENCE. — In an action against a railroad company for an injury at a railroad crossing, where it appeared that plaintiff, who was approaching in a vehicle, and was familiar with the crossing, when about two hundred and fifty feet from the crossing looked to the east, where he could see about one-fourth of a mile, and saw no

approaching train; that he did not look to the east again, but looked to the west, where the view of the track was somewhat obstructed; that if he had looked to the east, when within one hundred feet of the railroad, he would have had an unobstructed view of nearly one-half mile; that while driving to the crossing in a slow trot, he was struck by a train from the east and seriously injured; and that no signals were given by the approaching train, it was held, that the court might adjudge, as matter of law, that the plaintiff was guilty of contributory negligence.

FROM the Marion Superior Court. The facts appear in the opinion. *Judgment affirmed.*

B. HARRISON, W. H. H. MILLER, J. B. ELAM, F. WINTER and J. P. BAKER, for appellant.

A. C. HARRIS, A. L. ROACHE and E. H. LAMME, for appellee.

Coffey, J. — This action was begun on the 17th day of August, 1882, to recover damages sustained by the appellant in a collision with one of the appellee's trains at a highway crossing.

On a trial of the cause the appellant had judgment. An appeal to this court resulted in a reversal of the judgment, and the cause was remanded to the Marion Superior Court for further proceedings.

The cause was again tried at Special Term, resulting in another judgment in favor of the appellant. Upon appeal to the General Term the judgment was reversed, upon the ground that the evidence did not support the verdict. From the judgment of the General Term, reversing the judgment at Special Term, this appeal is prosecuted.

The controlling facts in the case are, that on the 25th day of June, 1882, in the afternoon of Sunday, the appellant, with a friend, was riding on a public highway south of the city of Indianapolis, known as the Churchman Turnpike Road, in an open vehicle drawn by one horse. The road was crossed by the double track of the appellee's road, which, at the point of crossing, runs in a northeasterly and southwesterly direction. The turnpike runs north and south, and is itself crossed at right angles by a street known as Cypress, at a point 316 feet north of the crossing of the turnpike and the appellee's railroad, at the place where the appellant received his injuries. The appellee's railroad crosses Cypress street at a distance of 345 feet east from the center of the turnpike. From the point in Cypress street crossed by the appellee's railroad said road runs southwest, and at a distance of 470 feet intersects the turnpike at the place where the appellant was injured. As the appellant was traveling south on

the turnpike, a locomotive and two or three freight cars came down from the northeast, and, as appellant was attempting to cross the track in the vehicle with his friend, the locomotive struck the horse and overturned the vehicle, resulting in serious and permanent injuries to the appellant. At the point where the injury occurred there was a grade of about twenty feet to the mile to the west, the steam was shut off, and the fireman was outside on the locomotive oiling the machinery, which could only be done when the locomotive was in motion.

There is some conflict as to the rate of speed at which the train was running, but we must assume here that the speed was that contended for by the appellant, which is thirty miles an hour. There was no one on the train except the conductor, engineer and fireman. The train as it approached the crossing made but little noise. To the west of the crossing there was a cut a few feet in depth, on the top of which was standing an open board fence, though trains passing through the cut could be seen, while so passing, by persons on the turnpike. Soon after crossing Cypress street, and at a point 250 or 275 feet from the place of the injury, the appellant looked to the east for approaching trains, and did not hear or see any, and thereafter neither he nor his friend looked in that direction, but both looked to the west, the view of which was somewhat obstructed as above stated. To the northeast from the point where they looked to the crossing there were no obstructions, the country being level, affording a free and unobstructed view of the track and along it for a distance northeast of about 1,500 feet east; while at a point about 100 feet from the crossing the track northeast could be seen for nearly one-half mile. The parties drove to the crossing in a slow trot, and did not stop until the collision occurred. They were familiar with the crossing, and had been familiar with it for many years. Those in charge of the train did not blow the whistle or ring the bell. The railroad was not used for travel by passengers, but only for switching and transferring freight trains and empty cars around the city of Indianapolis. Northeast of the crossing where the injury occurred, the appellee's railroad crosses three other public highways, namely, Cypress street, at a distance of 470 feet; Higgin's Branch, 309 feet further; and Knox street, 420 feet from Higgin's branch. To the southwest there were no crossings within three-fourths of a mile. The appellant knew and was familiar with all the surroundings.

The contention of the appellant, as we understand the argument of counsel in their able brief is that, under the facts above stated, the question of contributory negligence is one for the jury, under proper instructions from the court; in other words, that it was for the court to say what sort of care was required by the appellant in approaching the crossing at which he was injured, but it was for the jury to determine whether he exercised the quantity of care required by the law. It has often been decided by this court, as well as by all the other courts of last resort in the United States, that there is a class of cases in which the court will adjudge, as matter of law, that a party has or has not, under the given state of facts, been guilty of negligence, while in another class of cases the question of negligence will be left to the jury, under proper instructions from the court. *Smith, Neg.*, pp. 9-12; *Wabash, etc., R. R. Co. v. Locke*, 112 Ind. 404; *Evans v. Adams Express Co.*, 122 Ind. 362; *Directors, etc., v. Jackson*, 3 App. Cas. H. L. 193; *Ohio, etc., R. R. Co. v. Collarn*, 73 Ind. 261; *Baltimore, etc., R. R. Co. v. Walborn*, 127 Ind. 142; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Chicago, etc., R. R. Co. v. Hedges*, 118 Ind. 5; *Indiana, etc., R. R. Co. v. Hammock*, 113 Ind. 1; *Schofield v. Chicago, etc., R. R. Co.*, 114 U. S. 615; *Bellefontaine R. R. Co. v. Hunter*, 33 Ind. 335; *Indiana, etc., R. R. Co. v. Greene*, 106 Ind. 279. It is claimed by the appellant that this case falls within the latter class, while, on the other hand, it is earnestly contended by the appellee that it belongs to the former. Cases belonging to the first class exist where the facts are undisputed, and the inferences to be drawn from such facts are not equivocal, and lead to but one conclusion; while cases of the second class exist where there is a dispute as to the facts, or where, the facts being admitted, different inferences can reasonably be drawn from such facts. If such a state of facts exists as that one sensible, impartial man would infer that proper care had not been used and that negligence existed, while another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence, it is said to be the highest effort of the law to obtain the judgment of twelve men of the average of the community, comprising men of learning, men of little education, men whose learning consists only of what they have themselves seen and heard, the merchant, the mechanic, the farmer, and the laborer, as to whether negligence does or does not exist in the

given case. Such judgment is supposed to be more valuable in such cases than the judgment of a single judge. *Railroad Co. v. Stout*, 17 Wall. 657; *Ohio, etc., R. R. Co. v. Collarn, supra*; *Baltimore, etc., R. R. Co. v. Walborn supra*.

In cases of this class it is clearly the duty of the court to determine the kind of care to be used, while it is the exclusive province of the jury to determine the quantity. In order to correctly solve the question as to whether this case belongs to the class where the court will adjudge the question of negligence as a matter of law, or will refer it to the jury under proper instructions, it is necessary to know what duty, if any, the law imposes upon one approaching a railroad crossing, the kind of care required, and whether the law undertakes to measure the quantity. "When one approaches a point upon a highway, where a railroad track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. * * * If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by a collision, either that he did not look, or if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*." *Beach, Contrib. Neg.*, p. 191, sec. 63; *Ohio, etc., R. R. Co. v. Hill*, 117 Ind. 56. Where a person thus approaching a railroad crossing could have seen the train by looking, before he attempts to cross, and a collision occurs, it will be presumed he did not look, and by the neglect of so plain a duty he is guilty of such negligence as precludes him from recovering. *Wilcox v. Rome*,

etc., R. R. Co., 39 N. Y. 358. Mental absorption or reverie, induced by grief or business, will not excuse the omission of the duty to look and listen. *Havens v. Erie R. R. Co.*, 41 N. Y. 296. The presence of a railroad track upon which a train may at any time pass is notice of danger, and it is the duty of a person about to cross such road, on a public highway, to exercise caution in so doing, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution. *St. Louis, etc., R. R. Co. v. Mathias*, 50 Ind. 65; *Pittsburg, etc., R. R. Co. v. Martin*, 82 Ind. 476; *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168; *Pennsylvania, etc., R. R. Co. v. Richter*, 42 N. J. Law, 180; *Gorton v. Erie R. R. Co.*, 45 N. Y. 660; *Schofield v. Chicago, etc., R. R. Co.*, *supra*; *Cleveland, etc., R. R. Co. v. Crawford*, 24 Ohio St. 631; *Stubley v. Railway Co.*, L. R. 1 Ex. 13; *Conner v. Citizens, etc., R. R. Co.*, 105 Ind. 62; *Bellefontaine R. R. Co. v. Hunter*, *supra*. It will be seen by an examination of the authorities above cited that the law clearly prescribes the kind of care to be exercised by one about to cross a railroad, on a public highway, and that it undertakes to measure, to some extent, the amount or quantity of care to be exercised in such cases. In this case the appellant, when 250 or 275 feet from the railroad, looked along the same eastward where he could see a distance of about one-fourth of a mile, and saw no approaching train. He did not look again, but drove upon the track where the collision occurred. Had he looked when within 100 feet of the railroad he would have had an unobstructed view of nearly one-half mile. He was familiar with the crossing, and it must be presumed he knew this fact. When it is said that a person approaching a railroad crossing must look and listen attentively for approaching trains, it is not to be understood that he may look from a given point and then close his eyes; but it is to be understood that he must exercise such care as a reasonably prudent person, in the presence of such a danger, would exercise to avoid injury. The courts cannot close their eyes to matters of general notoriety, and to matters of every-day observation. We must know that a train of cars passing over iron or steel rails at a speed of thirty miles an hour does not do so without noise. We must know, too, that where a person possessing good eyesight, located within 100 feet of the track, has an unobstructed view of such track for a distance of nearly one-half mile, he cannot fail to see an approaching train before it

reaches him, if he looks attentively, and that if he is possessed of ordinary hearing he could not fail to hear it when listening attentively, if running at the speed of thirty miles an hour. When about to enter upon the crossing, looking in one direction only is not the diligence required by the law, for the law requires him to look in both directions, if it is possible to do so. As a rule, it is not necessary to stop and listen and look where approaching danger can be otherwise ascertained; but one approaching such crossing must exercise such care as will enable him, under the circumstances, to inform himself of the extent of the danger attending the crossing of the track, if he can reasonably do so. This appellant did not do. In our opinion, the facts in this case do not bring it within the class of cases where the court will determine the kind of care to be used, and leave the jury, under proper instructions, to determine the amount; but it belongs to that class where the court will adjudge, as matter of law, that the party was negligent. Having reached this conclusion, it follows that the Superior Court of Marion county, in General Term, did not err in holding that the evidence in the cause was not sufficient to sustain the verdict of the jury. Some questions are made and argued in relation to the refusal of the court below to give to the jury certain instructions asked by the appellee, but, having reached the conclusion that the evidence does not support the verdict of the jury, we deem it unnecessary to examine or decide these questions.

The judgment of the Superior Court of Marion county at General Term is affirmed.

HORSE FRIGHTENED BY NOISE FROM ENGINE AT CROSSING AND RIDER INJURED — COMPLAINT — SUFFICIENCY.—In *INDIANAPOLIS UNION RAILWAY CO. v. BOETTCHER*, 131 Ind. 82 (1891), horse frightened by noise of steam, whistle, etc., from defendant's engine at crossing, whereby plaintiff was injured, defendant appealed from judgment for plaintiff on the ground of error, among others, in overruling demurrer to first paragraph of the complaint. In discussing the appeal, OLDS, J., said: "Omitting the formal allegations of the complaint, it alleges: 'That on the 30th day of November, 1885, he, the said plaintiff, was then passing on and upon a certain public street and highway which intersects said Hadley avenue at or near the point where said Belt Railroad crosses the said avenue, and which street and highway runs in a southwesterly direction to said stock yards, and

parallel with said switch and side-tracks; that at said time he was using all diligence on his part to manage his horse well and avoid any accident, and was not guilty of any negligence whatever; that the horse which he was riding was gentle and docile; that at said time the defendant, by its agents, had and was in possession, control, and had the management of a certain locomotive engine which was upon said switch and side-track; that said defendant, by its agents and servants, well knowing that the plaintiff was passing upon said street and highway, and not regarding its duty in that respect, so carelessly and negligently ran and managed the said locomotive engine as to cause and suffer it, by blowing its whistle, the blowing off of its steam, and suffering its steam to escape from it, to make loud and unusual noises, and thus frighten the horse which the plaintiff was riding, and causing him to become unmanageable, and to thus throw this plaintiff from off his back to the ground, and thereby breaking plaintiff's leg and bruising his body in divers places.' It is contended that the paragraph of complaint does not allege any acts of negligence for which appellant is liable to respond in damages; that the appellant, upon its own grounds, has the lawful right to sound its whistle and to blow off its steam, and suffer its steam to escape, and that such acts are not *per se* negligent, and that these are the acts with which the appellant is charged with the commission of, and that no facts are alleged which would make the doing of such acts unlawful or the commission of them a nuisance. Counsel for appellant are led into an error by the interpretation placed upon the language of the complaint. It is true, no doubt, that the blowing of the whistle and necessarily allowing steam to escape in the ordinary and usual way are lawful acts, and unless some peculiar facts or special circumstances are alleged making such acts specially dangerous and hazardous to others, which facts and circumstances are known to the employees operating the engine, whereby it would become their duty to refrain from sounding the whistle or allowing the steam to escape at the particular time and place, the company would not be liable for such acts; but a liability would no doubt attach to the wantonly and purposely blowing off of steam and blowing of the whistle at a time when such acts would in all probability cause an injury to others. This paragraph charges that the appellee was on the street or highway in close proximity to the engine; that this fact was known to the employees operating the engine, 'that they so carelessly and negligently ran and managed said locomotive engine as to cause and suffer it, by blowing of its whistle, the blowing off of its steam, and suffering its steam to escape from it, to make loud and unusual

noises.' It does not charge the blowing of the whistle or letting off of steam in the usual and ordinary way, but doing it in such a way and manner as to make 'loud and unusual noises,' and that it was such loud and unusual noises that frightened the horse; that the horse was gentle and docile, and the appellee was using all diligence to manage him, but that by blowing the whistle, and careless and negligent management of the engine by blowing off of the steam, and suffering the steam to escape in such way as to make a loud and unusual noise, it frightened the appellee's horse, and caused the injury. The ordinary use of the engine, and the ordinary sounding of the whistle and escape of steam, is not negligence, and such use of the engine is not complained of; but it is the negligent and careless use of the engine, in disregard of the duty to sound its whistle, and blow off its steam in such a way as to cause it to make, not the usual noise, but an unusual noise. This paragraph of complaint is clearly sufficient to withstand a demurrer. *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; *Cincinnati, etc., R. Co. v. Gaines*, 104 Ind. 526; *Culp v. Atchison, etc., R. Co.*, 17 Kan. 475; *Favor v. Boston, etc., R. Co.*, 114 Mass. 350." * * *

Other alleged errors on the trial were discussed, but the court held that there was no error in the record and judgment was affirmed. *COFFEY*, Ch. J., and *MILLER*, J., dissented, holding that the first paragraph of the complaint did not state facts to constitute a cause of action.

COLLISION BETWEEN TRAIN AND VEHICLE AT CROSSING — COMPLAINT — PLEADING AND PRACTICE — EVIDENCE. — In *PENNSYLVANIA COMPANY v. HORTON*, 132 Ind. 189 (1892), collision with train and vehicle at crossing, it was held that in an action against a railroad company to recover damages for a personal injury, a general averment that the injury happened without the fault or negligence of the plaintiff is sufficient. It is not necessary to set out affirmatively all the precautions taken to avoid the injury. If a more particular and definite statement of the facts was desired, the remedy was by motion to make the complaint more specific. The court (per *MILLER*, J.), in reviewing the evidence in the case, said: "We have read the evidence with care, and find it very conflicting, upon every material question, except the location of the place where the accident took place; and the fact that the train was running at a rate in excess of that allowed under the city ordinance. The appellee in his evidence shows that he approached the track carefully, driving in a slow walk; that his hearing and sight were good, and the movement of his wagon in no respect interfered with either; that a number of freight cars stood

on the side track east of the crossing and extended out into the street, so that it was impossible to see the approaching train until he was right on the main track; that although he listened he did not hear the whistle sound, the bell ring, or the cars run; that he looked and listened attentively while approaching the track; that he knew that a great many trains were run over the road every day, but did not know the time of any of them; that from that point the railroad curved to the south; and that he had never crossed the road at that point before. The testimony given by the plaintiff was, to some extent, corroborated by other evidence. We regard the evidence as sufficient under the authority of *Ohio, etc., R'y Co. v. Buck*, 130 Ind. 300; and *Cleveland, etc., R'y Co. v. Harrington*, 131 Ind. 426, to make out a case in favor of the plaintiff. Judgment affirmed."

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. BURTON, ADM'X.

Supreme Court, Indiana, May Term, 1894.

[Reported in 139 Ind. 357.]

PLEADING — AVERMENT THAT PLAINTIFF WAS FREE FROM FAULT NOT NECESSARY. — It is not necessary to allege in a complaint by a wife, as administratrix, to recover damages for negligently causing the death of her husband, that she was free from fault.

ACCIDENT AT RAILROAD CROSSING — PLEADING — AVERMENT AS TO INABILITY TO SEE AND HEAR. — In a complaint to recover for negligently causing the death of the plaintiff's decedent at a railroad crossing, an allegation that the deceased was "unable to see or hear any engine or train of cars in motion on account of" certain described obstructions, is equivalent to an allegation that he did not see or hear the engine or train.

CONTRIBUTORY NEGLIGENCE — PLEADING — WHEN SPECIFIC CONTROLS GENERAL ALLEGATION. — A specific allegation will not control a general allegation of freedom from contributory negligence unless the specific allegation appears to include all of the occurrence and stands in conflict with that otherwise embraced in the general allegation.

DRIVING ACROSS TRACK AT STREET CROSSING — OBSTRUCTIONS — FINDING BY JURY. — Where one driving along a street which crosses two parallel railroad tracks, thirty-five feet apart, exercises due care in approaching and passing the first track, which is a side track, with cars standing thereon so as to obstruct the view of the main track, and then looks and discovers a train, which has not given the required signals, rapidly approaching upon the main track, and makes every possible effort to avoid a collision, it is immaterial how far he could have seen the train when he had crossed the side track, and a refusal to require the jury to make a finding upon that point is not error.

KILLING AT STREET CROSSING — NEGLECT TO GIVE SIGNALS — DAMAGES — STATUTE. — The act of March 29, 1879 (Acts 1879, p. 173; R. S. 1881, sec. 4020 *et seq.*), in so far as it fixes the damages recoverable for injuries caused by the failure of a railroad company to give certain signals at a highway crossing at five thousand dollars, was repealed by the general act of April 7, 1881 (R. S. 1881, sec. 284; R. S. 1894, sec. 285), fixing the limit of damages in all actions for death by the wrongful act of another at ten thousand dollars.

CARE REQUIRED OF TRAVELER AT CROSSING — CONTRIBUTORY NEGLIGENCE. — One who is about to cross over a railroad track at a street crossing is only required to exercise prudence and caution in proportion to the dangers incident to the crossing, with its obstructions and peculiar hazards; and so one who, being in possession of all of his faculties, drives toward a crossing with care, stops and looks and listens at a parallel side track thirty-five feet distant from the main track, but can hear no approaching train and can see none by reason of obstructing cars upon the side track, passes over the side track, again looks and listens and then cautiously approaches the main track, and when near it discovers a rapidly approaching train, which so frightens his ordinarily gentle horses that, notwithstanding his strongest efforts, they run forward upon the track and the driver is killed, is not guilty of negligence, and damages may be recovered where it appears that the defendant's servants in charge of the train negligently omitted to give the signals required by law.

DAMAGES — WHEN NOT EXCESSIVE. — A recovery of \$9,400 for the wrongful killing of an industrious and frugal farmer, in good health, with an expectancy of thirty-eight years, who leaves surviving a wife and infant child, cannot, on appeal, be said to be excessive.

SPECIAL VERDICT — INSTRUCTION. — Where the trial court submits two forms of special verdict with instruction to take either or modify either, or write one for themselves, but that they would "hardly be driven to this labor unless neither of the forms submitted states the facts proved in the form you prefer to state them," the instruction is not open to the objection that it intimates to the jury that they should adopt one or the other of the forms submitted.

PREPONDERANCE OF EVIDENCE — EFFECT OF OMISSION TO FIND FACT. — An instruction that, "if, on any material fact, the evidence is equal, so that there is no preponderance, you are not at liberty to find and state that fact in your special verdict," is not erroneous, as the failure to state the existence of a fact is equivalent to a finding that the fact is not proved by a preponderance of the evidence.

INSTRUCTION AS TO WHAT SHOULD BE RETURNED. — An instruction to a jury, where a special verdict is demanded, that all facts asserted by the plaintiff, if proved, should be returned and the facts asserted and not proved should be omitted, is correct.

INSTRUCTION AS TO FORMS SUBMITTED. — An instruction to a jury who are directed to return a special verdict, that "You are not required to find any fact to be proved because you find the same suggested in a verdict, or in the verdict of the party you desire to favor," and that "If you do not consider that one of the forms submitted to you speaks the truth, as you understand it, you cannot adopt it as your verdict," is not, properly construed, erroneous.

CONCLUSIONS DISREGARDED. — A mere conclusion stated in a special verdict as a finding will be disregarded.

(Syllabus of official report.)

FROM the Cass Circuit Court. The facts appear in the opinion. *Judgment affirmed.* Petition for a rehearing overruled.

N. O. ROSS and G. E. ROSS, for appellant.

J. C. NELSON, Q. A. MYERS, S. T. MCCONNELL and A. G. JENKINS, for appellee.

Hackney, J. — The appellee, as administratrix of the estate of her deceased husband, Thomas S. Burton, sued to recover damages for negligently causing the death of said Thomas at the crossing of the appellant's railway and Center street, in the incorporated town of Royal Center. The complaint alleges that the deceased, while attempting to cross said railway in his buggy, approached the crossing from the east on said street, and drove his team in a slow walk, and looked and listened, but "was unable to see or hear any engine or train of cars in motion, on account of the obstruction of his view by cars and trains of cars then and there standing upon the side tracks, which the said defendant had then and there negligently permitted to be and remain there, and on account of adjacent buildings and fences that intervened." In addition to the allegation of negligence in obstructing the view by cars, it was alleged that the appellant negligently failed to give any signal or warning of the approach of its engine and train by sounding the whistle or ringing the bell in the manner and within the distances from said crossing as required by law as to such signals, and that its train was negligently run at the rate of fifty miles an hour upon said crossing and against the buggy and team driven by the deceased, and in the collision whereby the said Thomas was killed. The allegation of noncontributory negligence by the deceased is repeated as to each charge of negligence against the company, and as to all the occurrences generally.

Two objections are urged against the complaint: 1. That it is not alleged that plaintiff, the widow, was free from fault; and, 2, that the allegation that the deceased was "unable to see or hear any engine or train of cars in motion, on account of said obstructions," was not equivalent to the fact that he could not or did not see or hear the train before going upon the track. As sustaining the first of these objections, are cited *Louisville, etc., R. Co. v. Boland*, 53 Ind. 398, and *Sullivan v. Toledo, etc., R. Co.*, 58 Ind. 26.

The first was a case involving a claim for the destruction by fire of certain buildings, and the ordinary rule was applied in holding that the owner was required to allege that he was free from negligence contributing to the loss. The second was an action to recover for the negligent killing of a minor child, and it was held necessary to allege that the father, who sought to recover, was guilty of no negligence contributing to the death of the child. One's property and his minor children are subjects of his care and control, and, as in agencies, he is responsible for their conduct and entitled to their service. Not so with the wife; her husband is not, legally speaking, subject to her control, and the right of action accruing to her or to his estate is that which he might maintain if living. If living, and prosecuting the action for his own personal injuries, his contributory negligence alone, and not that of his wife, would defeat the action. That relationship does not exist between the husband and wife which imputes the negligence of one to the other; especially is this true where the one sues in the right of the other, as in this case. The case of *Indiana Mfg. Co. v. Millican*, 87 Ind. 87, holds that in an action by an administrator it is not necessary to negative contributory negligence by the administrator. The fact that the widow administers is no reason for a distinction in the rule, and if the distinction could be maintained, and the rule carried to its logical conclusion, every complaint by an administrator would be required to negative the contributory negligence of each person interested in the recovery sought. The doctrine of imputed negligence in such cases was expressly repudiated in *Miller v. Louisville, etc., R. Co.*, 128 Ind. 97; *Louisville, etc., R. Co. v. Creek*, 130 Ind. 140.

As to the second objection to the complaint the appellant admits that, if the allegation so objected to had been omitted, the general allegation of freedom from contributory negligence would have made the complaint sufficient. We are aware of the rule that, where the facts pleaded show contributory negligence, the general negative allegation will not be sufficient; but the facts here specially pleaded, while not entirely sufficient of themselves, to show every precaution required of one crossing a railway, do not preclude the existence of further facts, and do not purport to set forth in detail all that he did to discover the approach of a train. In other words, we do not understand that a specific allegation will control the general allegation where the specific

allegation does not appear to include all of the occurrence, and stand in conflict with that otherwise embraced in the general allegation. *Warbritton v. Demorett*, 129 Ind. 346. But, aside from this, we cannot agree with counsel that an allegation that the decedent "was unable to see or hear" is less than that he could not or did not see or hear. If he was unable to, he could not; if he was able to, he did not. We conclude that the complaint was sufficient against the objections urged.

The jury trying the cause returned a special verdict, and thereupon the appellant moved the court "to require the jury to retire to their jury room, and make a finding in their verdict of how far the decedent could have seen a train approaching * * * when he was across the easterly side track, and thirty-five feet distant from the main track." The appellant now complains that the court erred in overruling this motion. It is not the object of the special verdict that it shall return the weight of the evidence upon every question about which witnesses testify. The facts in issue under the pleadings are required, and not the abstract questions of evidence, or evidentiary details. *Whitworth v. Ballard*, 56 Ind. 279. The jury did find that "when he had passed the west side of the defendant's car that stood in the said Center street, as aforesaid, he looked north, and saw the defendant's train approaching upon said main track from the north at a high rate of speed, to wit, at forty-five (45) to fifty (50) miles an hour, without sounding bell or whistle, when he instantly pulled vigorously upon his lines, and endeavored to stop his horses, that were by that time ten feet from defendant's main track, but that his team had by this time discovered the said approaching train, and become at once greatly frightened and unmanageable; that he exercised his utmost efforts to stop his team, to keep them off defendant's track, but was unsuccessful; that, finding he was unable to stop his team, he pulled vigorously upon his left line, and struck his off horse, and urged his team to turn to the left, to escape a collision, but without success; and was struck by said moving engine and train, and injured and killed." If he used proper care up to the time he passed the car on the side track, if, when he had passed the standing car, he saw the train, and if, after seeing it, he did all that was possible to do to avoid the collision—and we think this is the effect of the finding quoted—then the presence of a finding that the train was 100 or 1,000 feet from him when he first saw it would not be of controlling

force against the conclusions of due care on the part of the deceased.

In the court's instruction numbered 1, two forms of special verdict were submitted to the jury, with directions to take either or modify either, or write one for themselves to meet the facts as they might find them, and stated that they would "hardly be driven to this labor unless neither of the forms of verdict submitted states the facts proved in the form you prefer to state them." This statement, it is insisted, was an intimation to the jury that they should adopt one form or the other. We are unable to believe the language employed capable of the construction counsel give it. The introduction, when all of its parts were considered, was a plain direction that the jury could adopt either form, or modify either form, or reject both and propose a form to suit their finding, but that the labor of preparing a form would not be necessary if either form stated the facts as found. There is no complaint that this direction was not proper.

The second of the court's charges contained the following: "And if on any material fact the evidence is equal, so that there is no preponderance, you are not at liberty to find and state that fact in your special verdict." Appellant insists that this was an error, and that, where the evidence fails to preponderate in favor of an essential fact, the verdict should find expressly the non-existence of that fact. To this insistence is cited *Gulick v. Connelly*, 42 Ind. 134. We do not understand the rule to be as counsel state it, nor do we understand the case cited to have so held. The duty of the court or jury stating the facts specially is not to state the failure of one who assumes the burden of an issue, but the failure to state the existence of the fact is equivalent to finding the nonexistence of the fact. A fact not found is a finding that the fact is not proven by a preponderance of the evidence. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, and cases there cited.

The court instructed the jury that the maximum recovery allowed to the appellee, in the event the finding should be for her, was \$10,000. The appellant claims that the limit should have been stated at \$5,000. By the act of March 29, 1879 (Acts 1879, p. 173; Rev. St. 1881, §§ 4020, 4021, 4023; Rev. St. 1894, §§ 5307, 5308, 5310), certain signals were required to be given by railway companies before running their trains over highway crossings, and a right of action was given for injuries

sustained by reason of the failure to give such signals, and the amount of the recovery therefor was limited to \$5,000. By the act of April 8, 1881 (Acts 1881, p. 590; Rev. St. 1881, § 4020; Rev. St. 1894, § 5307), the first section of the act of 1879 was amended so as to require the engine whistle to be sounded distinctly three times not less than eighty nor more than 100 rods from any highway crossing, and to ring the engine bell continuously from the time of sounding such whistle until the engine should fully pass such crossing. As to the right of action so given by the act of 1879, and the limit in amount of damages so prescribed, the amending act made no change. By the act of April 7, 1881 (Acts 1881, p. 241, § 8; Rev. St. 1881, § 284; Rev. St. 1894, § 285), it was provided that when the death of one is caused by the wrongful act or omission of another, an action might be maintained therefor, and the limit in damages was provided at \$10,000, such sum to inure to the exclusive benefit of the widow and children, or next of kin. The latter act does not expressly repeal the act of 1879, and it remains to be determined whether there is a repeal by implication as to the amount of recovery. In Sutherland on Statutory Construction (section 145) it is said that "a new statute which affirmatively grants a larger jurisdiction or power or right repeals any prior statute by which a power, jurisdiction, or right less ample or absolute had been granted." This illustration is there cited from *Reg. v. Llangian*, 4 Best & S. 249. "An English statute authorized the removal of poor persons likely to become chargeable. The power was given to two justices, one to be of the quorum. A later statute recited that act, and repealed the provision for removal on the probability of their becoming chargeable, and enacted that a removal might be made of such persons, after they had become chargeable to the parish, by two justices of the peace, without mention of the quorum. It was held that the requirement that one of the justices be of the quorum, contained in the previous act, was repealed by implication. An early case in this State, in circumstances and principle much like the question under review here, holds that as a general rule it is not open to controversy that where a new statute covers the whole subject-matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old, then the former statute is repealed by implication, as the provisions of both cannot stand together." *President, etc., v. Bradshaw*, 6 Ind. 146. To the

same effect are *Madison, etc., R. Co. v. Bacon*, 6 Ind. 205; *Jeffersonville R. Co. v. Millet*, 8 Ind. 255; *Board, etc., v. Potts*, 10 Ind. 286; *Indianapolis, etc., R. Co. v. Davis*, 10 Ind. 398; *Evansville, etc., R. Co. v. Lowdermilk*, 15 Ind. 120; *Hayes v. State*, 55 Ind. 99; *Dowdell v. State*, 58 Ind. 333; *Wagoner v. State*, 90 Ind. 504. See also *Norris v. Crocker*, 13 How. (U. S.) 429; *People v Mayor of New York*, 32 Barb. 102-121. If the provisions of the act of 1879, extending the right and limiting the recovery, had been omitted therefrom, we apprehend that the act of April 7, 1881, would have supplied that right and limited the recovery. It is evident, therefore, that the act of 1881 includes these elements of the act of 1879 and grants a larger right, not only in the increase of the amount of possible recovery, but in defining the persons to whom the recovery shall go. It is evident that the legislature did not intend to continue the two provisions as to the amount of recovery, not only from the fact that the new act points out the persons who may recover, but because there could be no possible reason for limiting the recovery to \$5,000 for wrongfully causing the death of one by a failure to give required signals, when \$10,000 could be recovered for negligence of any other character, resulting in death. We conclude that the limiting clause of section 4 of said act of March 29, 1879, is repealed.

The court gave the following instruction, to which exception is made: "The burden rests upon the plaintiff of proving the material facts averred in the complaint. Whether the facts are material, however, need not cause you trouble, as that is a question of law for the court. You find what facts have been proved, and, in determining what have been proved, it will be necessary for you to consider what facts have been attempted to be proved, and by whom — that is, by which party. If the plaintiff asserts a fact, and offers evidence to prove it, and the defendant offers evidence to disprove it, you will then weigh all of the evidence on that point. If you find that the evidence of the plaintiff outweighs that of the defendant, you should find the fact proved, and it should become a part of your verdict. If the evidence of the defendant upon that point outweighs that of the plaintiff, you will leave that fact out of your verdict. And it may arise that you will find the evidence equally balanced upon a fact asserted by the plaintiff; that is, you will find that, after you have carefully considered all of the evidence upon such fact upon

both sides, you are unable to determine which side has the preponderance. In such case you should omit the fact asserted from your verdict. These remarks apply to the facts averred, and upon which proof was offered by the plaintiff; the same will apply to facts asserted by the defendant. After plaintiff has made proof of facts to entitle her to recover, her recovery may be defeated by other facts proved, which avoid the effect of the facts so proved by the plaintiff. These facts are averred by the defendant, and constitute a part of the defense. The burden of proving such facts is upon the defendant by a fair preponderance of the evidence." It is objected that the jury are told that the plaintiff must prove the material facts, and are not advised what are material facts, but are advised that what facts may be material need not trouble them, since that is a question of law for the court. The plain direction of the court by this instruction is that all facts asserted by the plaintiffs, if proven, should be returned by the verdict, and those facts so asserted, and not proven, should be omitted. This was correct, since the jury were to return a special verdict, and the facts asserted by the plaintiff, and not returned, would be considered by the court as not proven, and those returned would by the court be weighed in the light of their materiality, and if found to cover all of the issues necessary to a recovery, and not overthrown by facts found in behalf of the defendant, would, as a matter of law, authorize judgment for the plaintiff. There is no place for the criticism that, in the event the evidence of the plaintiff's witnesses established a fact asserted by the plaintiff adversely to the plaintiff, it would be the duty of the jury, under this instruction, to so return. The fact asserted by the plaintiff, and not proven, was directed to be omitted. In the event supposed, the fact would necessarily be omitted, and, if essential to a recovery, would defeat the action.

Another instruction was in submitting the forms of special verdict as prepared by the parties, respectively. One expression to which exception is taken is: "You must not forget that you are not required to find any fact to be proved because you find the same suggested in a verdict, or in the verdict of the party you desire to favor." It is said that the suggestion that it was possible for the jury to entertain a desire to favor a party gave them a wrong impression of their duties. In the absence of evidence, there is no permission to the jury to extend favors to the

litigants, and, in other charges given, the burden of proof was clearly defined, and the jury impressed that this burden should be discharged before a fact could be found in favor of a party asserting it. The phrase "the party you desire to favor" was so manifestly employed in the sense of "the party with whom you find the merits" that the jury were not given to understand that their verdict could be bestowed by favor. If the expression were palpably so employed, as appellant contends, it would be difficult to determine that the appellant was harmed by it. This further sentence in the instruction is criticised: "If you do not consider that one of the forms submitted to you speaks the truth, as you understand it, you cannot adopt it as your verdict." It is said that this was erroneous, since the verdict was not to be found upon what the jury understood, but upon the facts to be found by a preponderance of the evidence. Verdicts are necessarily rendered, when properly rendered, upon the understanding of the jury, and the basis of that understanding is the truth of the facts as they find such facts established by a preponderance of the evidence. No valid objection can be urged, we believe, against this instruction.

It is insisted, in support of the sixth and seventh causes for a new trial, that the verdict is not sustained by the evidence in so far as it is found that the deceased exercised due care, and did not contribute to the collision by his own negligence. The collision occurred at the crossing of Center street, running east and west, and the main track of the railway running north and south. East of the main track, at the crossing, are two side tracks, the distance between the inner rails of the outer tracks being thirty-four feet and nine inches. The deceased was approaching the crossing from the east, driving slowly a span of gentle horses to a light buggy without top curtains. On his right, on the north side of Center street, and extending up to within four feet of the first side track, and standing immediately north of the street, was a warehouse, and before reaching the warehouse, for more than one square, no view could be had of a train approaching the crossing from the north; at the crossing the street is sixty feet wide, and at the crossing of the street and the first side track the street was obstructed by a box car, standing more than half its length into the street, and extending near the used portion of the crossing. So driving, the deceased reached a point where his horses passed the end of the box car, when he checked them, leaned

forward to get a view to the north unobstructed by the car, and, although he looked and listened, he could neither see nor hear the approaching train, though he could from that point see but 100 feet up the main track. He then started forward, and, when he had passed the car, he looked north, and saw the train approaching at the rate of forty-five or fifty miles an hour. He instantly pulled vigorously upon the lines, endeavoring to stop the horses, which had then come within ten feet of the main track; the team became frightened, and he could not stop them, and immediately upon observing this, and acting with all haste and great strength, he pulled upon the left line, and struck the horse nearest the main track, in an effort to guide the team south and away from the track, and at this instant the locomotive crashed upon him. While approaching the crossing, and in his efforts to see and hear and avoid collision with appellant's train, the deceased was in possession of all of his faculties. Not attempting to weigh the evidence, but viewing that most favorable to the appellee, the conduct of the decedent in that moment of peril was as we have stated. Many general principles and numerous authorities are cited by appellant's able and diligent counsel to support the claim that the decedent was not free from negligence. These principles and authorities require no more than that the decedent should have exercised prudence and caution in proportion to the dangers incident to the crossing with its obstructions and peculiar hazards. Perhaps a better statement of the rule is that of appellant's counsel: "The care to be exercised by him should have been commensurate with the danger to be encountered." The measure of care is not that the traveler shall secure absolute freedom from the dangers which flow from the negligence of railway operatives. If such were the requirement, an utter abandonment of care could prevail on the one side with a high degree of care on the other, and with no remedy for injuries. It is certainly sufficient for the ends of justice that, when the company has been negligent, the traveler has done all that he reasonably could to avoid collision, and that it has been all that prudence and reasonable caution would suggest under the circumstances, and consistent with his right to use the highway crossing. Among the few things suggested by the appellant as necessary for the decedent to have done, and which it is claimed that he did not do, it is said: "When he had passed the obstruction, and could see the train approaching, he should have

stopped his team instantly, or turned them out of the way of danger." It must be remembered that, as found by the jury, at the time he had passed the box car he looked and saw the train coming at the rate of forty-five or fifty miles an hour, and when he had made an unsuccessful effort to stop his team, it then being within ten feet of the main track, he made a faithful and diligent effort to do the very thing suggested, but failed. Is it wonderful that a vigorous effort to stop the team should have failed? Hardly, when we consider that horses are not as subject to command and as free from excitement in a perilous situation as are experienced persons, and when we remember that they could have been placed in no situation more certain to frighten them and render them uncontrollable. Appellant urges that the decedent having gotten his team so near the track that they became frightened and unmanageable is contributory negligence, and the fright of the team should not be deemed a circumstance excusing the avoidance of injury. The following from *Rhoades v. Chicago, etc., R. Co.*, 58 Mich. 263, is quoted: "If a person approaching a railroad crossing *without reasonable caution and care*, particularly where a fast train is due, and approaching a railroad crossing, and by reason thereof his team becomes unmanageable, goes upon the track, and injury results, there is such contributory negligence as will prevent a recovery." This may be true "without reasonable caution and care," but not in the presence of caution and care. *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542. And it is said that, when he discovered the approaching train, he should have turned his team to the north between the two side tracks, where there was a wagon way. A choice of the direction in which to turn from the danger could not be made with the cool deliberation of one in no peril, and not balked by the natural instincts of the animals to fly from the approaching danger, instead of turning towards it. To have turned the team towards the north would have required the overcoming of the fright from which the horses were suffering, and to have induced them to face the train, and remain within a few feet of it while it passed. The effort to do so would have been a probable failure, but, in considering what Burton was required to do under the circumstances, it should not be overlooked that the time in which to make a choice was not that which permitted deliberation; the train was coming at the rate of 500 feet each seven seconds, or more than seventy feet in a second; and its coming

imperiled life. Under the circumstances, and looking at the situation without fear and with time for reflection, we have no doubt that his choice to drive the team down the track was better than to have adopted the course suggested for him by the appellant.

It is further insisted that the evidence does not support the finding that the decedent listened, or that he did not hear the train. We find evidence of his conduct when he halted at the end of the box car, leaned forward, and looked towards the north; his actions were described to the jury, and, while the illustrations of the witnesses are not given in the record, it does appear that they gave illustrations. The manner of inclining the head, the fact that he looked, the time and manner of going forward after looking, are all circumstances from which the jury might reasonably have determined that he listened. The fact that some persons more favorably situated than the deceased heard the train, and that others did not hear it, and considering the obstruction of the view and hearing by the box car, and the fact that the decedent pressed forward after looking and listening, are all circumstances from which the jury were required to determine whether he heard or did not hear the approaching train. We are certainly unable to say that the weight of the evidence was not as found by the jury.

It is urged that the finding of negligence on the part of the appellant, and the assumption that any act or omission of the appellant caused the collision, is not supported by the evidence. One finding of negligence returned by the jury in their special verdict is as follows: "We further find that upon said 4th day of October, 1890, as defendant's train number twenty (20) aforesaid approached said Center street crossing in said town of Royal Center, defendant omitted, neglected, and failed, when said train was not less than eighty (80) rods and not more than one hundred (100) from said Center street crossing, to sound the whistle attached to the locomotive engine of said train, or any whistle, three times distinctly, and then and there omitted, neglected, and failed to ring the bell attached to said engine, or any bell, continuously from the time when said train came within eighty (80) rods of said crossing until said engine had passed said crossing, and omitted, neglected, and failed to sound any whistle or ring any bell after the said train came within eighty (80) rods of said crossing, until so near it that it was then and there too late for

said Thomas S. Burton to see and hear said train, and escape collision with it. That defendant's whistle upon said engine was sounded by giving one long blast for the station at Royal Center, when between the Chicago and Runkle crossings as it approached said Center street crossing, a distance from said Center street of about 2,500 feet." As to whether the bell was rung, the appellant expressly concedes that there was conflict in the evidence, so that we may presume that the jury held that conflict most favorable to the appellee. There was evidence from which the jury might have found that the whistle was not sounded for the crossing when the collision occurred, and that the only sounding of the whistle within two miles of that crossing was one blast near a quarter of a mile north of Runkle crossing, which crossing was 1,800 feet north of Center street crossing. This neglect of a duty expressly enjoined by statute, if the injury can be attributed to it, is sufficient to charge the appellant with the consequences. Rev. St. 1881, sec. 4020, 4021, *supra*; Terre Haute, etc., R. Co. v. Brunker, *supra*; Baltimore, etc., R. Co. v. Walborn, 127 Ind. 142; Cincinnati, etc., R. Co. v. Butler, 103 Ind. 31; Chicago, etc., R. Co. v. Boggs, 101 Ind. 522; Cincinnati, etc., R. Co. v. Hiltzhauer, 99 Ind. 486; Indianapolis, etc., R. Co. v. McLin, 82 Ind. 435; Pittsburg, etc., R. Co. v. Martin, 82 Ind. 476; Chicago, etc., R. Co. v. Fenn, 3 Ind. App. 250. In the absence of the statute requiring that the engineer shall, "when such engine is not less than eighty nor more than 100 rods from such crossing, sound the whistle on such engine distinctly three times and ring the bell attached to such engine continuously from the time of sounding such whistle until such engine shall have fully passed such crossing," it would be the duty of the railway company to give reasonable and timely warning of the approach of its trains to highways. This statute expresses the legislative definition of the character and extent of warning which shall be required, and less than the warning required is not deemed reasonable, and constitutes negligence. The duty enjoined is for the benefit of persons entitled to use the crossings, and was designed to give such timely notice of the approach of trains as would enable such persons to avoid the dangers of the crossing. Crossings are dangerous, but the public and the railways have the right to use them, and, to save human life, it has been provided that one blast of the engine whistle is not enough, nor are two sufficient, but there shall be three, and the bell shall be rung

continuously for eighty rods. This is necessary that, if the traveler is occupied and does not hear the first or the second, he may hear the third, or, if his conveyance makes such noises that he does not catch the first sound, he may have further opportunity, and, if he happens to lose all of the whistle blasts, he may have an opportunity, while the train is running eighty rods, to hear the bell. But appellant insists that the decedent could have heard the sound of the whistle given at the approach to Runkle crossing, and indulges the presumption that he did hear it, concluding, therefore, that further sounding of the whistle or ringing of the bell was unnecessary. The weakness of this position is in the fact that there is no evidence that he did hear the sounding above Runkle crossing, and the jury find that he did not hear it. It is said that, though negligent in failing to give the signals, it does not appear that the collision is attributable to that negligence. In *Chicago, etc., R. Co. v. Boggs, supra*, this court quoted with approval from *Pierce on Railroads*, p. 350: "The omission is calculated to mislead the traveler, and to assure him that the coming train is not imminent." It was there further quoted from *Pittsburg, etc., R. Co. v. Martin, supra*, as follows: "The signal required by law not being given, the view being obstructed, and the plaintiff not being hard of hearing, he had no reason to suppose that the train was within eighty rods of the crossing; he was misled by the defendant's negligence in omitting the proper signal; he was not guilty of negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing towards the crossing within a distance of eighty rods." In *Terre Haute, etc., R. Co. v. Brunker, supra*, it was said that the failure to give the required signals was an inducement to the traveler to approach within an unsafe proximity to the crossing. The care exercised by the decedent to learn of the approach of the train, and the effort made by him to avoid the collision after he discovered its approach, are controlling circumstances in reaching the conclusion that, if he knew of its approach, he would not have gone upon the track. Having once reached the conclusion that he exercised diligence, that the appellant was negligent, and that, but for such negligence, the collision would probably not have occurred, it follows as a necessary consequence that the negligence was the cause of the collision. In the view taken of the case, it is not necessary to consider the effect of the alleged

leaving of the box car across the street as an element of negligence combining to establish appellee's cause of action nor need we determine whether the high rate of speed was negligent under the circumstances, nor do we examine the question as to whether it was the duty of the appellant to have maintained a flagman at the crossing.

Complaint is made that the assessment of damages in the sum of \$9,400 was excessive. The true measure of recovery is the pecuniary loss of those entitled to recover. The loss to his child of the father's care and training is one element of this measure of damages. *Board, etc. v. Legg*, 93 Ind. 523. The loss to the wife of a means of support in the service and assistance of her husband is one element of the measure of damages. *Board, etc., v. Legg, supra*; *Korrady v. Lake Shore, etc., R. Co.*, 131 Ind. 261. As tending to establish the extent of these losses, it is proper to consider the probable future earnings of the husband and father, and his age, health, strength, occupation, habits, opportunities, and capability as elements of this consideration. *Ohio, etc., R. Co. v. Voight*, 122 Ind. 288; *Hudson v. Houser*, 123 Ind. 309; *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168; *Louisville, etc., R. Co. v. Wright*, 134 Ind. 509. These cases recognize the rule that the gross earnings should be subject to deduction on account of the reasonable cost of his own support, and that the present payment of the sum awarded in damages is a proper circumstance in determining the amount which shall be allowed as the equivalent of the earning capacity of the deceased. But it is said that "when the relation of the party whose death has been caused to those for whose benefit the suit is being prosecuted has been shown, and his obligation, disposition, and ability to earn wages or conduct business, and care for, support, advise, and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of the jury." *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566; *City of Wabash v. Carver*, 129 Ind. 552. The ultimate question of the amount resting within the sound discretion and province of the jury, their finding will never be disturbed when the court cannot say that improper motives have swayed them in ascertaining the amount returned. *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261; *Louisville Co. v. Pedigo*, 108 Ind. 481; *City of Wabash v. Carver, supra*. Burton's expectancy was thirty-eight and one-tenth years; he was in good health and of sound constitution, temperate,

industrious, and frugal; he was a farmer who could earn, as some of the witnesses stated, on a rented farm, \$50 per month. His personal expenses were not estimated. It will be seen that during his expectancy his probable earnings would have aggregated a large sum. The value of his services to his wife and his infant child until it attained its majority, of a personal character, and independent of those things purchasable from his earnings, is not estimated in the evidence nor by counsel, and the appellant, we infer, would exclude any estimate by the jury of that element of damage. We do not think it should be excluded; of course, not desiring to be understood as intimating that compensation may be given for wounded feelings, or loss of comfort and companionship, for there are actual services to be performed for the wife and the child, in sickness and in health, which are not merely in ministering to their comfort or enjoyment. These the jury, in the range of the discretion given them under the law and the evidence, and applying the results of their common observation and daily experience, may estimate, and add to the sum shown to be the net earning capacity of the decedent, after deducting his personal expenses, as they may be estimated, and considering the value of the present payment of the sum to be awarded. We cannot say, in view of the rules suggested and the facts stated, that the jury abused their discretion in assessing the sum found, though we might not have awarded so large a sum. Objection is made that the special verdict finds a conclusion, and not a fact, in the finding that Burton was killed "by and because of the negligence and carelessness of the defendant, and wholly without any fault or negligence" on his part. In the tenth finding of the jury, above quoted, the facts are found which, as we have already shown, establish the negligence *per se* of the appellant. In the ninth, eleventh, twelfth, and fourteenth findings of the jury the character of the crossing, and the obstructions to the view and from the sounds of an approaching train, the speed of the train, and the conduct of the decedent are all given in detail, and are sufficient, as we have stated them and have already held, to establish due care of the decedent in attempting to cross the tracks. If we should hold that the finding objected to is a conclusion, and not a fact, it would be our duty to disregard that finding, and, if we should disregard it, enough is found to establish both the negligence of the appellant causing the death and the absence of negligence on the part of Burton contributing,

and the finding of a conclusion would not vitiate the verdict. *Terre Haute, etc., R. Co. v. Brunker, supra.*

There are other questions suggested in the appellant's brief which have already received our consideration, or are not so argued as to advise the court of any substantial objection to the proceedings of the lower court. Finding no available error in the record, the judgment of the Circuit Court is affirmed.

COLLISION BETWEEN VEHICLE AND TRAIN AT CROSSING — SPECIAL VERDICT — FINDING — PRESUMPTION OF NEGLIGENCE — DUTY OF TRAVELER — FLAGMEN AT CROSSING. — In *SMITH v. WABASH R. R. CO.*, 141 Ind. 92 (1894), collision between vehicle and train at crossing, judgment for defendant in the Warren Circuit Court was affirmed, the finding by the jury being stated by MONKS, J., as follows: "It is stated in the special verdict that Main street, in the city of Danville, Illinois, was, when the injury complained of was inflicted, the principal thoroughfare east and west through said city, and was much traveled; that appellee's railroad tracks cross said street, and that appellee had, for sixteen years prior to that time, kept a flagman at said crossing between the hours of 7 o'clock A. M. and 6:30 o'clock P. M. of each day, to warn all passengers approaching said crossing of the danger from locomotives and trains of cars; that appellant had frequently crossed said railroad on Main street, prior to September 15, 1891, when said injury was inflicted, and had seen the flagman at said crossing, and received warnings from him at various times, and had become accustomed to depend on said flagman for warning if it were not safe; that appellee had erected a flagman's house on the south side of Main street, and west of the tracks; that Main street, including sidewalks, is eighty feet wide at said crossing, and is paved with bricks, and was crossed by four tracks of appellee's road; that appellee's passenger depot is on the west side of its tracks, about 180 feet north of Main street; that about 100 feet west of the railroad tracks, and on the north side of Main street, is a three-story brick building called the "Russell House;" that there are no buildings in the angle, and space between the Russel House and the south end, and side of said passenger depot, and the view, from said point east from said Russel House to said railroad tracks, and from said Main street north to the south end of said passenger depot, was unobstructed, and a person approaching said railroad track on Main street, going eastward, can, at a point 100 feet west of said crossing, see north on said tracks 345 feet; and from a point eighty feet west of said crossing,

400 feet; and from a point sixty feet west from said crossing, 470 feet; and from a point forty feet west of said crossing, 690 feet; and from a point thirty feet west of said crossing, 1,280 feet; and from a point twelve feet west of said crossing, a quarter of a mile; that appellant believed that all trains passing on said road stopped at said passenger depot; that on the 15th day of September, 1891, appellant, not exceeding ten minutes before he was injured, was approaching said crossing from the west driving a two-horse wagon, sitting high up, and saw a passenger train pass over said crossing rapidly, going south; that immediately after said train passed appellant passed over said crossing and went about a block and turned his team around and drove back over said crossing and back into said city to get some nails he had forgotten, and, not being able to get them, went on said Main street eastward, approaching said crossing; that when he came within 100 feet of said crossing, he looked and saw that no train was approaching between the passenger depot and the crossing, and turned his attention and sight to the flagman's house, to the south of Main street, and did not look up the track north a second time to see if any locomotive or train of cars was approaching said crossing, but looked for the flagman and any sign of warning of approaching train or danger, and not seeing the flagman or any sign or signal of danger, he did not look further for the train or stop his team, but continued to approach said crossing slowly, looking to see if said flagman would appear and give him any warning or signals of approaching train or danger, and not seeing any flagman or sign of danger, and not seeing any danger or hearing any approaching train, and relying upon the said flagman to give him warning or signal of any approaching train or danger, drove his said team and wagon upon said crossing in the belief that there was no danger in so doing; that as appellant drove his horses drawing said wagon upon the railroad track at said crossing, a locomotive, with the headlight burning, and train of cars, without stopping at the depot, approached at a rate of speed of more than ten miles an hour from the north and struck plaintiff; that appellant did not know it was the custom not to have a flagman at said crossing after 6:30 P. M. of each day; that said flagman was not at said crossing on the two occasions when appellant crossed the same, just prior to the injury; that it was between 6:30 o'clock P. M. and 7 o'clock P. M. of said day when appellant was injured, and there was no flagman at said crossing at the time when he approached and drove upon said crossing; that at the time he was injured he did not, after first coming into view of the track to the passenger depot, look up the track north a second time to

see if any train of cars was approaching said crossing, but kept looking towards the southeast and to the right to the flagman's station and for the flagman; that he did not hear the approaching train which injured him until it was within ten or fifteen feet of him; the bell on said engine was rung, but was not heard by appellant; such bell when rung could be heard 100 yards; that appellant did not, as he approached said crossing, stop his team and listen for an approaching train; that appellant had frequently passed on said crossing prior to the day on which he was injured without seeing the flagman or receiving a signal of warning from him, and upon such occasions had always passed the crossing safely; that appellant used proper care and caution in driving upon said crossing when he was injured; that he was deceived and misled into believing it was safe and proper to go upon the said crossing at such time by the act of appellee in not maintaining a flagman at said crossing, and in not giving him any warning or signal of danger, and in passing said passenger train over said crossing so recently before the said train and locomotive which struck and injured appellant; that appellant had good sight, but was somewhat deaf prior to the injury; that his horses were not afraid of cars, and could have been and were controlled, and he could have turned around in Main street before reaching the crossing; that on the said 15th day of September, 1891, and for more than eight years prior thereto, there had been in full force and effect in said city of Danville, Illinois, an ordinance requiring appellee to keep a flagman at the crossing on Main street, where appellant was injured, whose duty it was to signal and warn any person traveling in the direction of said crossing of the approach of any locomotive, car or train of cars, or other impending danger; that on said 15th day of September, and for more than ten years prior to that time, there was in full force and effect in the State of Illinois a statute which provided that if any train, locomotive engine or car be run at a greater rate of speed in or through the incorporated limits of any city, town or village than is permitted by any ordinance of such city, town or village, such railroad company shall be liable to the person aggrieved for all damages done the person or property by such train, locomotive engine or car, and the same shall be presumed to have been done by the negligence of said railroad company; that at the time said injury was inflicted, and for eight years prior thereto, there was in full force and effect in said city of Danville an ordinance providing that no locomotive engine, freight or passenger car, or train, shall be run within the limits of said city at a greater rate of speed than ten miles an hour; that the proof did not show that appellant had

any actual knowledge of the existence of said ordinance, or either of them." The court said: "It is earnestly insisted by appellant that he exercised all care required of him under the circumstances in approaching the crossing, and was not guilty of contributory negligence. On the other hand, appellee contends that as appellant, after he came within 100 feet of crossing, had an unobstructed view of the track looking north a distance of 345 feet, which increased as he approached the track to 1,280 feet, at thirty feet from the track, and a quarter of a mile at twelve feet from the track, he was guilty of negligence in not looking in that direction; that if he had looked he could have seen." The rulings of the Supreme Court are sufficiently stated in the syllabus of the case by the official reporter as follows:

"When a person crossing a railroad track is injured by collision with a train, the fault is *prima facie* his, and he must affirmatively show that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury.

"When a person approaches a railroad crossing on a level with the track, it is his duty to proceed with caution, whether on foot or in a vehicle, and he must exercise ordinary care under the circumstances in so doing. The question of care at railway crossings as affecting the traveler, is, as a rule, a question for the court.

"In attempting to cross a railroad track, a traveler must listen for signals, read signs put up as warnings, and look attentively both ways for approaching trains, if the surroundings are such as to permit of that precaution. If by looking he could have seen an approaching train in time to have avoided the injury, it will be presumed in case he is injured by a collision with a train, that he did not look, or, if he did look, that he did not heed what he saw.

"A traveler at a railway crossing is not excused from looking and listening for a train by reason of the fact that he knew a flagman was accustomed to be at the crossing and give warning of approaching trains, and at the time of the injury, not seeing the flagman, he presumed there was no danger from an approaching train, and in acting upon that presumption he attempted to cross and was injured.

"The statute of another State concerning the presumption of negligence pertains to the remedy and has no extraterritorial force.

"Only where the facts found by the jury are such that two or more inferences may be reasonably drawn from them under the law that the finding by the jury of one of such inferences will be regarded by the court. In such a case the ultimate fact must be stated by the jury in favor of the party seeking a recovery, or

judgment will be rendered thereon against him. If the facts found are such that the court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, then the finding of such ultimate fact, whatever it may be, will be disregarded by the court." Judgment for defendant affirmed. W. A. RABOURN, L. NEBEKER and D. W. SIMMS appeared for appellant; E. P. HAMMOND, C. B. STUART and W. V. STUART, for appellee.

PERSON RIDING IN VEHICLE KILLED IN COLLISION WITH TRAIN AT CROSSING — DEFECTIVE CROSSING — NEGLIGENT MANAGEMENT OF TRAIN — DUTY OF TRAVELER AND RAILROAD COMPANY AT CROSSING — IMPUTED NEGLIGENCE. — In LAKE SHORE AND MICHIGAN SOUTHERN R'Y CO. v. MCINTOSH, ADM'R, 140 Ind. 261 (1894), action for negligent killing of plaintiff's intestate while riding in vehicle driven by plaintiff, caused by collision with train at railroad crossing, judgment for plaintiff for \$4,000 in the Steuben Circuit Court was affirmed. The syllabus by the official reporter of the points decided by the Supreme Court (as per opinion by HOWARD, J.), sufficiently states the case, and is as follows:

"An instruction to the jury, in an action against a railroad company for negligence, that they should inquire whether the injuries resulting in death 'were produced by the negligence of the defendant, its agents, servants or employees,' does not amount to a statement requiring the jury to say or find whether the injuries were caused 'by the negligence of the defendant or by its agents or servants or employees.'

"If the plaintiff be injured by reason of the negligent construction and maintenance of a public highway crossing by the defendant railroad, taken in connection with the negligent running and management of its trains at such crossing, then there may be a recovery, the plaintiff being without fault, although neither the defective crossing nor the negligent running and management of the train, taken by itself, would have brought about the same or a like result.

"The fact that the former owners of a railroad constructed a defective crossing does not authorize or justify the succeeding owners to maintain and use it in such defective condition, and the fact that the crossing was constructed many years before the time of the injury occasioned by its defective construction cannot lessen the liability of the railroad company, but, on the contrary, increases such liability.

"A traveler approaching, on a public highway, a railroad crossing, must use such care to avoid injury as men of common prudence

and intelligence would ordinarily use under like circumstances. The amount of care required depends upon the risk of danger. The rights and duties of railroad companies and travelers upon highways crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other. Each must use ordinary care in proportion to the danger.

" A railway company crossing a highway must restore it to its original condition as nearly as possible, after its railroad is constructed across it; and thereafter keep such crossing in good condition. It must restore the whole of the road, however wide; it is not enough for it to put in order the part usually traveled.

" A railroad company must run its trains over a crossing difficult of passage and hazardous with greater caution, to prevent injuries to travelers.

" A wife riding in a conveyance driven and controlled by her husband and negligently injured at a highway crossing by the locomotive of the defendant, running on its railroad, if she herself is free from fault, is not prevented from recovering damages, although her husband be guilty of negligence. His negligence cannot be imputed to her.

" Words in an instruction to a jury must be taken in their plain and usual meaning. Verbal niceties and refined grammatical distinctions are not to be resorted to if the meaning of the language used is plain to a common intent.

" If no objection be made to a question (or answer), a motion to strike it out comes too late, even if the evidence be irrelevant or otherwise improper." Judgment affirmed. J. MORRIS, R. C. BELL, J. M. BARRETT and S. L. MORRIS appeared for appellant; F. S. ROBY, W. L. PENFIELD and J. F. SHUMAN, for appellee.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. KEELY.

Supreme Court, Indiana, May Term, 1894.

[Reported in 138 Ind. 600.]

CHILD INJURED AT RAILROAD CROSSING — NEGLIGENCE OF PARENTS — PLEADING. — It is not negligence in parents to let a boy eleven years of age attend school, where to do so the boy must cross a railroad in going to and from school; and a complaint in an action by such boy for personal injuries sustained while crossing the railroad, need not allege that his parents were free from negligence, but it is sufficient to show his own freedom from contributory negligence, the boy being *sui juris*.

VIOLATION OF CITY ORDINANCE — SUDDENLY STARTING TRAIN, STANDING ACROSS STREET, WITHOUT WARNING — CUSTOM. —

It is negligence in a railroad company to obstruct a street crossing with its train to the interruption of public travel for fifteen minutes, in violation of a city ordinance; and it was also negligence, after allowing the train to stand still across the street and sidewalk, the engineer having left his usual post on the engine, to then start back suddenly without warning, where persons were waiting on either side of the crossing, and had waited so long, particularly children going to and returning from school, who had for a long time been allowed to cross through standing trains at that point.

CONTRIBUTORY NEGLIGENCE — APPEARANCE OF SAFETY. — Where a school boy, eleven years of age, had stood on the sidewalk five or six minutes in a heavy, cold rain, waiting for a chance to get across the railroad, on his way home at noon, the roadway at that point being very deep with mud, the train having come to a standstill, and the engineer having left his usual post on the engine, it was not negligence for the boy, by permission and direction of the flagman at such crossing, to attempt to pass through the train at the coupling of two cars, as he had often done before in safety, at the direction of the flagman, the boy's action being justified by the appearance of safety created by the railroad company (1).

(Syllabus of official report.)

FROM the Marion Circuit Court. The facts appear in the opinion. *Judgment affirmed.*

B. K. ELLIOTT, W. F. ELLIOTT, J. T. DYE, A. BAKER and E. DANIELS, for appellant.

W. V. ROOKER, for appellee.

Howard, Ch. J. — This was an action for personal injuries, brought by the appellee against the appellant. The material allegations of the complaint are that on the 9th day of November, 1891, the appellant company was operating a line of railroad extending along Louisiana street, and across New Jersey street, in the city of Indianapolis; that on said day the appellee was, and now is, an infant eleven years of age, a pupil attending the public schools of said city, and residing with his parents on the west

1. *Boy attempting to cross track at street crossing. —* In LOUISVILLE, NEW ALBANY & CHICAGO R'y Co. v. RUSH, 127 Ind. 545 (1890), it was held that "a child seven years of age, attempting to cross a railroad track at a street crossing, when a train standing on such crossing is so moved as to give a clear passageway, is not guilty of such contributory negligence as will defeat a recovery by its father, if another train on an opposite and parallel track, and only a few feet from the first track, unseen by the

child, suddenly strikes and injures such child in attempting to cross the second track, when if it had remained standing between the tracks it would have escaped injury." Judgment for plaintiff affirmed. (The court cited Louis., etc., R'y Co. v. Schmidt, 126 Ind. 290; Ind., etc., R'y Co. v. Pitzer, 109 Ind. 179; Byrne v. N. Y. Cent., etc., R. R. Co., 83 N. Y. 620; Barry v. N. Y. Cent., etc., R. R. Co., 92 N. Y. 289; Rauch v. Lloyd, 31 Pa. St. 358).

side of said New Jersey street, and north of said line of railroad; that the public school at which he was a pupil was situate on New Jersey street, and south of said line of railroad; that the roadway of New Jersey street, at and near the railway tracks, was obstructed and impassable to appellee by reason of the accumulation of filth thereon, and of debris from certain public works and improvements thereabouts then in progress; that on said day he was on his way homeward to his dinner at the noon hour of intermission of said school, and had passed northward along the west sidewalk of New Jersey street until he arrived at the point of crossing the railroad tracks, where he found the appellant was wholly obstructing said street intersection with a locomotive engine and train of cars, which the appellant's servants were moving to and fro along said Louisiana street tracks, and across New Jersey street, in the act of switching said cars, and distributing the same upon the yard tracks on the west of the New Jersey street intersection; that it was then and there a violation of an ordinance of said city to obstruct said street intersection with said cars or locomotive engine for more than three minutes at any one time, except in case of accident; that on said occasion there was no accident, but said obstruction was maintained for a long time, to wit, fifteen minutes, by reason of the moving to and fro of said train for the purposes, and in the manner, aforesaid, so that the further progress of appellee was then and there delayed for fifteen minutes; that, during all the time that appellee was so halted and delayed on the south side of said tracks, a cold and heavy rain was falling, and the appellee had begun to suffer, and was suffering, from the exposure to which he was subjected; that, after appellee had been so delayed for fifteen minutes, the appellant's servants halted said train so that an aperture or opening of coupling in said train, as it was then connected together, was directly in front of the sidewalk where appellee was so delayed; that, upon halting said train, the engineer thereon abandoned his usual post on the locomotive engine, and, apparently to appellee, went away; that appellant then and there maintained a flagman, whose duty it was to direct persons as to their crossing said tracks; that appellant well knew of appellee's situation; that appellee, being in great haste, and in fear of punishment if further delayed, and being in distress from said exposure, and believing it was the duty of the flagman to direct him across said tracks, as he had, under like

circumstances, previously done and assisted to do, and relying upon the superior wisdom, experience, and discretion of said flagman, and of the apparent absence of said engineer, as appellant well knew, appellee, pursuant to the recommendation and direction of said flagman then and there given, undertook in a careful manner to cross the said tracks through said coupling, aperture, and opening, and, while he was so doing, appellant's servants, though they well knew appellee's situation, negligently, carelessly, and wrongfully set the said locomotive engine and cars in motion, by reason of which, and without any fault on his part, the appellee's left foot was caught, crushed, and mangled, and he has suffered great bodily pain and mental anguish, and is permanently disfigured, crippled, and disabled — all to his damage, etc. On the overruling of a demurrer to this complaint, the appellant answered in general denial, and the cause was submitted to a jury for trial. The evidence on the part of the plaintiff (appellee) having been concluded, counsel for the defendant (appellant) moved the court for a nonsuit, and asked the court to instruct the jury to return a verdict for the defendant on the evidence of the plaintiff. This motion was argued in the absence of the jury, and, on the reassembling of the jury, was overruled by the court. Thereupon the defendant filed its demurrer to the evidence introduced by the plaintiff, in which demurrer the plaintiff joined. Upon the demurrer so filed to the evidence by the defendant, and the joinder therein by the plaintiff, the court delivered its instructions to the jury, and directed a verdict assessing damages only, and, after argument by counsel, the jury returned an assessment of damages in the sum of \$4,000. The court then overruled the demurrer to the evidence, and rendered judgment on the verdict.

The errors assigned on the appeal are, 1, the overruling of the demurrer to the complaint; 2, the overruling of the motion to instruct the jury to return a verdict for the defendant; 3, the overruling of the demurrer to the evidence; 4, the rendering of judgment on the verdict.

Counsel for appellant suggest, rather than argue, that the complaint is deficient. The case of *Lake Shore, etc., R. Co. v. Pinchin*, 112 Ind. 592, is cited to prove that one who attempts to pass between the coupled cars of a freight train standing temporarily across a street, and either knows, or might know, that the train is likely to move at any moment, is guilty of contributory negligence. But in the case before us it does not appear from the

complaint that the appellee either knew, or might know by the use of his faculties, that the train was likely to move at any moment. On the contrary, after standing in the rain for fifteen minutes, waiting while the train moved to and fro across the street, he perceived that the train came to a halt with an aperture or opening of coupling directly in front of the sidewalk where appellee stood. At the same time appellee saw the engineer leave his post on the engine. The flagman, also placed there to aid travelers to pass the track in safety, directed him to cross through the opening. This the flagman had, under like circumstances, previously done, and appellee relied upon the experience and discretion of the flagman, as well as upon the abandonment of his station by the engineer, and so undertook the passage in confidence. The two cases are quite dissimilar.

It is also intimated, though not seriously urged, that the complaint should have alleged due care on the part of the parents of appellee. In *Pittsburg, etc., R. Co. v. Vining*, 27 Ind. 513, it was correctly said that the "unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is in itself an act of negligence on the part of the parent." The child in that case was seven years of age, and the court accordingly held that the allegation in the complaint that the parents were without fault was proper and sufficient. A like ruling was made in *Lafayette, etc., R. Co. v. Huffman*, 28 Ind. 287, where the child was but five years old, and it was held that the complaint should have alleged due care on the part of the parents. In the case which we are considering, the appellee was eleven years of age, and was a pupil in attendance upon a school upon the same street upon which his parents lived, and going to and from which he crossed this track many times a day. In *Downs v. N. Y. C. R. Co.*, 47 N. Y. 83, a boy twelve years of age, traveling upon a train with his mother, and not finding room in the car with her, was allowed by her to go into another car, and afterwards, in leaving the other car, he was injured, and it was held not to have been negligence on the part of the mother to have let such a boy go from her into the other car. The appellee in this case is suing for his own injury. He was capable of going, himself, to school across the railroad, and his parents are not in the case, nor is it necessary that they should be. Besides, the facts alleged show that there could be no negligence on their part. They were not at fault for letting such a boy

attend school on the same street as their home, even if he had to cross a railroad when coming home to dinner. In such a case it is sufficient to aver, as the complaint here does, that the party was himself guilty of no negligence which contributed to the injury. *Louisville, etc., R. Co. v. Boland*, 53 Ind. 398. Contributory fault need not be denied when the facts stated show that there was no such fault. *Duffy v. Howard*, 77 Ind. 182; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87.

In their argument against the overruling of the demurrer to the evidence, counsel for appellant contend that appellee was guilty of contributory negligence, and that appellant was not guilty of negligence, as shown by the evidence. The evidence shows: That the appellee was on his way home to his dinner from school, the school being south of the railroad tracks, and his home north, both on the same street. That he arrived at the tracks about ten or fifteen minutes after noon, and found a train standing over the crossing. That it was raining very hard. That he stood waiting on the sidewalk five or six minutes. That the roadway at that point was ankle deep with mud and filth caused by work going on near by — the building of a viaduct. That the train moved east at first, part of a square, not clearing the crossing; then backed up, and stood still four or five minutes. That the engineer left his place on the engine. That there was a flagman at the crossing, and, when the engineer left his place, appellee asked the man if he would have time to go through, and the flagman replied, "Yes; plenty of time; skip through;" and appellee started as directed. That he could not put his foot on the bumper — it was too high — and he put it in the link, and, as he raised the other foot, the cars started up and mashed his foot. The appellee had several times before, when going to and from school, and the crossing was blocked by a train, been directed by the flagman to go through, and had always gone through all right. The court held this and other corroborating evidence sufficient to show that appellee was without fault, and we cannot see that there was any error in such holding. Appellee had stood a long time in the November rain, patiently waiting for a passage home to his dinner. He had often before, when on his way from school, and the train was on the crossing, by direction of the flagman, gone safely through. It was with him not a question of danger, but one of time. The train was standing for several minutes. The engineer had left his post,

and the flagman had told him there was plenty of time ; to skip through. Having waited so long in patience, taken all precautions, and been directed by the man placed there in authority, and whose discretion and experience were known to appellee from like previous occasion, he could not, as we think, be charged with negligence in acting as he did. An appearance of safety was created by the train brought to a halt, the engineer away from his place, and the flagman's direction to go through, coupled with the former crossings in safety. Such appearance of safety created by the railroad company justified the appellee's action. *Chicago, etc., R. Co. v. Boggs*, 101 Ind., at page 527, and authorities there cited.

Much of what has been said as to absence of negligence on the part of appellee is applicable also as showing negligence on the part of appellant. It was, besides, negligent in the company to occupy the street crossing, to the interruption of public travel on a thoroughfare, for so long a time as fifteen minutes, and after standing still across the street and sidewalk, and the engineer leaving his post, then to start back suddenly without warning, with persons waiting so long on either side as shown in the evidence, particularly children going to and returning from school, who had for a long time been allowed to cross through standing trains at that point. This evidence and the witnesses were all before the court, and the court, hearing it, deemed the evidence sufficient to show negligence on the part of appellant. To us, the ruling seems reasonable. The engineer had kept his train so long upon the crossing, and at length stood it still over the street and sidewalk, himself also leaving his post upon the engine, could not but know the public character of the street and observe the persons on each side, including school children, waiting in the cold, heavy rain, impatient at delay at the dinner hour, nor could he avoid perceiving the deep mud-covered street. Ought he to return suddenly to the engine, and, without a note or word of warning, push back his train among those men, women, and children, careless of danger to them? We have said little of the youth of appellee. But, as said by Elliott, J., in *Binford v. Johnston*, 82 Ind. 426, "the age of the child is always to be taken into account;" and in the same case Lord Ellenborough, in *Townsend v. Wathen*, 9 East, 277, is quoted as saying that "every man must be taken to contemplate the probable consequences of the act he does." The carelessness of the flagman

is conceded, but we think it also clear that the trainmen proper were likewise guilty of negligence. The demurrer to the evidence was properly overruled, and the judgment is affirmed.

NOTES OF INDIANA CASES RELATING TO ACCIDENTS AT RAILROAD CROSSINGS.

Among other Indiana cases relating to collision and crossing accidents are the following:

COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — CONTRIBUTORY NEGLIGENCE. — In **TOLEDO & WABASH R'Y CO. v. GODDARD**, 25 Ind. 185 (1865), action for injuries to wagon and horses of plaintiff caused by collision of defendant's cars with same at street or public highway, crossing railway track, judgment for plaintiff was reversed, it being held that plaintiff's negligence contributed to the injury, and answers to certain interrogatories did not find facts sufficient to sustain verdict. It was also held that where the engineer of a train sounds the whistle and rings the bell, and runs the train at a reasonable speed in approaching a crossing, he exercises reasonable and ordinary diligence which is all the law requires. Where negligence is the issue it must be a case of unmixed negligence to justify a recovery, and the injured party cannot recover if his own want of ordinary care contributed to the injury.

PERSON DRIVING ACROSS TRACK KILLED IN COLLISION WITH TRAIN — DUTY OF TRAVELER — FAILURE TO GIVE SIGNALS DOES NOT EXCUSE FAILURE TO LOOK AND LISTEN. — In **BELLEFONTAINE RAILWAY CO. v. HUNTER, ADM'R**, 33 Ind. 335 (1870), action for negligently causing death of plaintiff's intestate who was killed by defendant's train while crossing track in a wagon, judgment for plaintiff for \$3,500 was reversed for erroneous admission of evidence and the giving of certain instructions. On the question of negligence the court very fully reviewed the authorities, the ruling in the cases being stated in the syllabus by the official reporter (using practically the language of the court) as follows: "No neglect of duty on the part of a railroad company will excuse any person approaching on a highway a crossing of the track of said company from using the senses of sight and hearing, where these may be available; and injury to such person where the use of either of such faculties would have given sufficient warning to enable him to avoid the danger conclusively proves negligence, and there can be no recovery for such injury, unless the railroad company has been guilty of such conduct as to

imply an intent or willingness to cause the injury; and this can be attributed only where the company has notice of the particular emergency in time to avoid the collision by the use of ordinary diligence, the means being at hand. If the injured party had such warnings and opportunities of knowledge as would with ordinary caution in such circumstances have saved him from the danger, he will be held to have knowingly contributed to his own injury. The failure of a railroad train to give any signal when nearing a public crossing is not of itself negligence in this State, unless the peculiar circumstances, the concealment of the train or the like, may render it necessary and proper." Judgment reversed.

In *INDIANA, BLOOMINGTON & WESTERN R'Y CO. v. WHEELER*, 115 Ind. 253 (1888), collision between wagon and train at crossing, the facts are stated in the syllabus of the case by the official reporter as follows: "A team drawing a loaded wagon was seen by the engineer of an approaching train to be coming on an up grade towards a public crossing, at a point where trains could be seen for more than 900 feet. The engineer sounded the signals required by statute, and also sounded danger signals. The driver of the team, a youth twenty years old, and familiar with the crossing, was lying upon the wagon seemingly asleep or otherwise unconscious. The engineer did not see the driver, but supposed he was walking on the opposite side of the team. Seeing that the team would not be halted, the engineer, when still several hundred feet from the crossing, made every effort to stop the train, but without avail, and the driver was killed. *Held*, that the facts do not show a cause of action for either a negligent or a wilful injury." Judgment for plaintiff reversed. (See also *CINCINNATI, ETC., R. R. Co. v. LONG*, 112 Ind. 166; *INDIANA, ETC., R. Co. v. HAMMOCK*, 113 Ind. 1.)

In *MILLER v. TERRE HAUTE & INDIANAPOLIS R'Y CO.*, 144 Ind. 323 (1895), collision between train and vehicle at railroad crossing, it was held that the failure of a railroad company to give the statutory signals on approaching a crossing, does not render it liable for an injury to a traveler who drives upon the crossing without looking or listening for the approach of a train, and judgment for defendant in the Marion Superior Court was affirmed.

It was decided in the case of *Cadwallader v. Louisville, etc., R'y Co.*, 128 Ind. 518, that if a person approach a crossing with which he is familiar, and at which a flagman is stationed, and the flagman does not give notice of the approach of danger, such person would have no right to presume that none existed, and enter upon the

track without looking, and if under such circumstances the person was injured the court would adjudge, as a matter of law, that he was guilty of contributory negligence, and he could not recover damages therefor. But if the flagman had done anything to induce such person to attempt to cross at the time he was injured, or anything to throw him off his guard, then the question of contributory negligence would have been a question for the jury. *Chicago, etc., R. R. Co. v. Hedges*, Adm'x, 105 Ind. 398.

COLLISION BETWEEN VEHICLE AND TRAIN — FAILURE TO SIGNAL NEGLIGENCE *PER SE*. — PENNSYLVANIA CO. v. KRICK, 47 Ind. 368 (1874), collision between team and train at crossing, whereby plaintiff's horses were killed and wagon damaged; judgment for plaintiff affirmed. "It is the duty of an engineer to give sufficient signals of the approach of his train to a road crossing by ringing the bell, sounding the whistle, or otherwise, as may be practicable, where the circumstances seem to require it."

CHICAGO & EASTERN ILLINOIS R. R. CO. v. BOGGS, 101 Ind. 522 (1884), collision between wagon and train at crossing; judgment for plaintiff affirmed. "It is the duty of railroad companies to give the signals required by statute when approaching a public crossing, and a breach of this duty constitutes negligence." Petition for rehearing overruled.

In **CINCINNATI, HAMILTON & INDIANAPOLIS R. R. CO. v. BUTLER**, 103 Ind. 31 (1885), collision of train with buggy at crossing in which plaintiff, who was driving, was injured, judgment for plaintiff was reversed for erroneous instructions as to negligence. "The failure to give signals at a public crossing is negligence *per se*." But a person injured while crossing track will not be relieved from the presumption of contributory negligence, because of failure to give signals or running of train at speed prohibited by city ordinance, if it is shown that he could, by proper diligence, have avoided the injury. (Citing *Bellefontaine R'y Co. v. Hunter*, 33 Ind. 335; *Toledo, etc., R'y Co. v. Shuckman*, 50 Ind. 42; *St. Louis, etc., R'y Co. v. Mathias*, 50 Ind. 65.)

STATUTORY REQUIREMENT AS TO SIGNALS AT CROSSING. — In **PITTSBURG, ETC., R'y Co. v. MARTIN**, 82 Ind. 476, it is said, in speaking of the Indiana statute requiring railroad companies to signal approach of trains at crossings: "While such a law existed, a violation of it was undoubtedly a failure to give reasonable, proper and timely notice. The signal required by the law not being given, the view being obstructed, and the plaintiff not being hard of

hearing, he had no reason to suppose that the train was within eighty rods of the crossing; he was misled by the defendant's negligence in omitting the proper signal; he was not guilty of negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing towards the crossing within a distance of eighty rods."

In CINCINNATI, ETC., R'y Co. v. HILTZHAUER, 99 Ind. 486, the general subject was discussed, and it was held that the omission to give the signals required by statute constituted negligence, and that the statute gave a right of action to one injured in person or property by such negligence.

In PITTSBURGH, ETC., R'y Co. v. YUNDT, 78 Ind. 373, it was held that even where there is no statute requiring signals to be given, or flagmen stationed at crossings, yet, if it has been customary to give signals or provide flagmen, it may be negligence to discontinue them.

PERSON INJURED AT RAILROAD CROSSING — GROSS NEGLIGENCE OF RAILROAD COMPANY. — LAFAYETTE & INDIANAPOLIS R. R. CO. v. ADAMS, 26 Ind. 76 (1866), person run over by locomotive while crossing track at street crossing; judgment for plaintiff affirmed. The rule that where the negligence of defendant is so gross as to imply a disregard of consequences, or a willingness to inflict the injury, plaintiff may recover though he be a trespasser, or did not use ordinary care to avoid the injury, applied in this case, where the evidence showed that the train was run at a speed so great as to show want of care to avoid injury to persons at the crossing.

As to trespassers on track, see LOUISVILLE, ETC., R'y Co. v. PHILLIPS, 112 Ind. 59; IVENS v. CINCINNATI, ETC., R. Co., 103 Ind. 27.

As to right of way. — A traveler who approaches the highway is bound to know he must yield precedence to the trains, and that he has no right to expect them to slacken speed, much less to stop, and yield him priority of passage. CINCINNATI, ETC., R. Co. v. BUTLER, 103 Ind. 31; INDIANA, ETC., R. Co. v. GREENE, 106 Ind. 279; BELT R. R. Co. v. MANN, 107 Ind. 89; OHIO & MISS. R'y Co. v. WALKER, 113 Ind. 196. See also PALMER v. CHICAGO, ETC., R. Co., 112 Ind. 250; INDIANAPOLIS, ETC., R. Co. v. PITZER, 109 Ind. 179; TERRE HAUTE, ETC., R. Co. v. GRAHAM, 95 Ind. 286.

PERSON INJURED AT RAILROAD CROSSING — DUTY OF RAILROAD COMPANY — INSTRUCTION. — In OHIO & MISSISSIPPI R'y Co. v. WALKER, 113 Ind. 196 (1887), person injured while crossing track on public street, by reason of alleged negligent

running of defendant's train; judgment for plaintiff was reversed for erroneous instruction as to duty of railroad company at railroad crossing. "A railroad company is not bound to bring its train to a stop or to slacken its speed when a person is seen crossing, or about to cross the railroad track at its intersection with a highway or street, but may presume that the traveler will take all proper precautions to avoid injury, and it is error to refuse to so instruct the jury."

Crossing track — What must be shown in complaint — Instruction. — In *HATHAWAY v. TOLEDO, ETC., R'Y Co.*, 46 Ind. 25, the following instruction was held to be a correct statement of the law: "When a person crossing a railroad track is injured by collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury." See also *CINCINNATI, ETC., R'Y Co. v. GRAMES*, 136 Ind. 39.

CHILD INJURED AT CROSSING. — LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. SCHMIDT, 126 Ind. 290 (1890), child struck by train at street crossing; judgment for plaintiff affirmed. Petition for rehearing overruled. A former judgment in this case was reversed for insufficiency of complaint; 106 Ind. 73. See also *INDIANAPOLIS, ETC., R'Y Co. v. PITZER*, 109 Ind. 179; *SULLIVAN v. TOLEDO, ETC., R. Co.*, 58 Ind. 26; *KRENZER v. PITTS. CIN. CHICAGO & ST. L. R'Y Co.*, 151 Ind. 587, 3 Am. Neg. Rep., 137, overruling petition for rehearing and affirming judgment for defendant; 43 N. E. Rep. 649.

For other collision and crossing accident cases, see *SULLIVAN v. TOLEDO, ETC., R. Co.*, 58 Ind. 26; *TERRE HAUTE, ETC., R. R. Co. v. BRUNKER*, 128 Ind. 542; *PITTSBURG, ETC. R'Y Co. v. MARTIN*, 82 Ind. 476; *CLEVELAND, ETC., R'Y Co. v. HARRINGTON*, 131 Ind. 426; *CINCINNATI, ETC., R'Y Co. v. HOWARD*, 124 Ind. 280; *OLESON v. LAKE SHORE, ETC., R. R. Co.*, 14 Ind. 405; *CINCINNATI, ETC., R. Co. v. DUNCAN*, 143 Ind. 524; *IND. ETC., R. R. Co. v. STOUT*, 53 Ind. 143; *LOUIS., ETC., R'Y Co. v. BUCK*, 116 Ind. 566; *CHICAGO, ETC., R. Co. v. SPILKER*, 134 Ind. 380; *LOUIS., ETC., R'Y Co. v. FAYLOR*, 126 Ind. 126 (person traveling on free pass on freight train injured in collision); *HOGGATT v. EVANSVILLE, ETC. R. Co.*, 3 Ind. App. 437; *LAKE ERIE, ETC. R. Co. v. CARSON*, 4 Ind. App. 185; *OHIO, ETC. R. Co. v. McDONALD*, 5 Ind. App. 108; *IND. ETC. R. Co. v. NEUBACHER*, 16 Ind. App. 21.

HUGHES v. CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY.

Supreme Court, Iowa, May Term, 1893.

[Reported in 88 Iowa, 404.]

COLLISION BETWEEN WAGON AND TRAIN AT CROSSING — OBSTRUCTED VIEW — CONTRIBUTORY NEGLIGENCE — EVIDENCE. — In an action to recover for injuries sustained from a collision between plaintiff's wagon and defendant's train at a crossing, it appeared that about 300 feet from the crossing the highway was about twenty-five feet higher than the crossing, and from that point the highway descended towards the crossing, and just before reaching it passed through a cut, the east bank of which cut, at a point 108 feet south of the crossing, was nine feet and two inches higher than the crossing. The plaintiff claimed that on the morning of the accident there were places before the crossing was reached from which he could not see an approaching train, and his testimony was supported by several witnesses, photographs, and a plat of the locality. To disprove this testimony defendant introduced witnesses, photographs and plats which showed that a person sitting in a wagon on the highway, forty feet south of the crossing, could see an approaching train 627 feet away, and from a point thirty feet from the crossing, and also from the crossing a train could be seen for 744 feet. At the time of the accident, however, portions of the bank between the highway and railway were covered with a dense growth of weeds and grass which made a screen from two to three feet in height, through which plaintiff could not have seen, which screen had disappeared when defendant's photographs were taken. The engineer and fireman of the train testified that they were looking ahead constantly, but did not see plaintiff until a moment or two before the collision occurred. *Held*, that the evidence that plaintiff could not see the train from twenty to forty feet from the crossing was ample to sustain verdict for plaintiff as to that issue (1).

FAILURE TO SIGNAL AT CROSSING — EVIDENCE. — The employees of defendant, and another person who lived in the vicinity, testified that the signal for a crossing was given by the engine whistle when near the whistling post, but the testimony of the latter witness was discredited by his own statements, and a greater number of witnesses for plaintiff, who

1. *Collision at crossing — Failure of look and listen — Plain view of track — Contributory negligence.* — In *Reeves v. Dubuque & Sioux City R'y Co.*, 92 Iowa, 32 (1894), collision between wagon and team at crossing, it was held that "one who is familiar with a crossing, knows that a train is due, drives to crossing rapidly, and with track in plain sight does not look or listen anywhere within twenty rods of the crossing, contributes to injury received by his team." Motion for new trial, after verdict for defendant, was granted in the Lyon District Court, but the Supreme Court ruled that the trial court erred in sustaining motion for new trial, and it was reversed, the evidence showing gross negligence on plaintiff's part contributing to the injury.

were in a position to hear the signals if given, testified that they did not hear them. *Held*, that the jury were authorized to disregard defendant's witness on that point and to find that defendant was negligent in not giving the required signals.

APPEAL from Marshall District Court. The facts appear in the opinion. *Judgment affirmed.*

CUMMINS & WRIGHT and J. L. CARNEY, for appellant.

CASWELL & MEEKER, for appellee.

Robinson, Ch. J. — On the 25th day of September, 1890, defendant owned and operated a railway which extended through Marshall county. In the morning of that day the plaintiff was driving a team of horses, attached to a wagon, northward on a highway in the county named, and when on a crossing of defendant's railway, the wagon in which he was sitting was struck by the locomotive engine of a freight train which approached from the south, and he was thrown out and injured. For the injuries thus received, and for injuries alleged to have been caused to the horses, harness, and wagon, he seeks to recover. He claims that the injuries in question resulted from the negligence of defendant in not sounding the whistle and ringing the bell of its engine, as required by law. The defendant denies negligence on its part and alleges that the accident was caused by the negligence of plaintiff.

1. The highway approaches the place of the accident from the south, over a hill the top of which is about twenty-five feet higher than the crossing, and about 300 feet from it. From the top of the hill the highway descends towards the crossing, and, just before reaching it, passes through a cut. The highway is sixteen inches higher than the crossing at a point forty feet south of it. The railway approaches the crossing from the southwest on a grade descending at the rate of fifty-three feet per mile, at an angle of about twenty-five degrees, and when near the crossing it passes through a cut. At a point 108 feet south of the crossing the east bank of that cut is nine feet two inches higher than the crossing, and at a point about 150 feet further south it is thirteen feet eight and one-half inches higher than the crossing. The center of the highway at the top of the hill is less than 150 feet from the railway, and a person sitting in a wagon at that point can see the track from the crossing southward a distance of more than 1,600 feet. The plaintiff claims that on the morning of the accident, while sitting in his wagon, as it was drawn

northward from the top of the hill, there were places before the crossing was reached from which he could not see a train as it approached from the south; that as he was going down the hill out of sight of the track he looked for a train, but none was in sight; that his horses were walking at the rate of about three miles an hour; that when they were within about twenty feet of the track he checked them, listened and looked both ways for a train, but, not hearing or seeing any, he started over the crossing, and the accident occurred. To sustain his claim that there were places in the highway from which he could not see the train, he introduced several witnesses and photographs and a plat of the locality. The evidence thus presented is clear and direct, and tends strongly to sustain his claim. To disprove it the defendant introduced witnesses, photographs and plats which show that a train south of the crossing can be seen by a person sitting in a wagon in the highway forty feet south of the crossing a distance of 627 feet, and from a point thirty feet south of the crossing, and also from the crossing, a distance of 744 feet. If certain of the photographs offered by defendant were taken when the obstructions to sight were as great as when the accident occurred, and from the points at which plaintiff says he looked for the train, and the highway was unchanged, the conclusion would be irresistible that he must have seen the train had he looked for it, and that he was negligent in attempting to cross as he did; but, when the accident occurred, portions of the point of land or bank between the highway and railway were covered with a dense growth of weeds and timothy grass, which made a screen from two to three feet in height, through which the plaintiff could not have seen. That screen had so nearly disappeared six months later, when the photographs of defendant were taken, that it had ceased to hide an approaching train from the view of a person in the highway. It is shown that the highway has been raised somewhat, near the crossing, since the accident occurred, and there is evidence to the effect that one side of it is, in places, lower than the other. It is not, therefore, certain that the camera used to take the photographs of defendant was on the same level as were the eyes of the plaintiff when he looked for the train. The testimony of plaintiff that he was not in sight of the train when he was about thirty feet from the crossing is corroborated by that of the engineer, fireman and brakemen of the train. The engineer states that he was looking ahead constantly, and did not see the

plaintiff until a moment or two before the collision occurred. The fireman states that he was looking out of the cab window, but did not see plaintiff until his horses had nearly reached the crossing. The rear brakeman was on the top of a car near the rear end of the train, and saw plaintiff's team when it was on the hill, but it disappeared from his sight, and he did not see plaintiff again until the latter was within ten or fifteen feet of the crossing. The front brakeman was on the second or third car from the engine. He saw plaintiff disappear in the cut near the crossing, and did not see him again until he was within ten or fifteen feet of it. We conclude that the evidence to show that plaintiff could not see the train when from twenty to forty feet from the crossing is ample to sustain the verdict as to that issue.

2. The conductor, engineer, fireman, and brakemen of the train, and a man named Wright, who lived in the vicinity, testify that the signal for a crossing was given by the engine whistle when the engine was near the whistling post, and about 1,000 feet from the crossing, and all of them but the conductor and Wright testify that the bell was sounded from that time until the crossing was reached. It is shown without dispute that the danger signal was given by the whistle just before the crossing was reached, but plaintiff contends that before the danger signal was given no sound was made by the bell or whistle, and testifies to that effect. When he was about half way down the hill he met two men who were driving southward. After they had passed him a short distance they saw the train, but neither of them heard the bell, although the train passed but a few rods from them, nor the whistle, until it gave the danger signal at the crossing. Five other witnesses, of whom two were within sixty, and two within ninety, rods of the crossing, heard the danger signal, but no other, although all could have heard the crossing signal had it been given at the whistling post. Two witnesses heard Wright say that the whistle was not sounded until the danger signal was blown; hence the jury were authorized to disregard his testimony on that point. The greater number of witnesses support the claim of plaintiff that no signal was given until the engine had nearly reached the crossing, and that the whistle could have been blown at the whistling post without being heard by some of them is improbable. The conflict in the evidence on that branch of the case is too great to permit us to say that the verdict is not supported by the evidence. That it was the duty

of defendant to sound the whistle and ring the bell before the crossing was reached is not questioned. See Acts 20th Gen. Assem., § 1, c. 104; *Reed v. Railway Co.*, 74 Iowa, 190. The train was moving rapidly on a descending grade, with brakes set, and without using steam, making comparatively little noise, and the testimony of plaintiff that he listened for it when near the crossing, but did not hear it, is not unreasonable. We conclude that the judgment of the District Court is right. It is therefore affirmed.

COLLISION BETWEEN VEHICLE AND STREET CAR — OBSTRUCTED VIEW — CONTRIBUTORY NEGLIGENCE — FAILURE OF MOTORMAN TO EXERCISE CARE. — In *ORR v. CEDAR RAPIDS & MARION CITY R'Y CO.*, 94 Iowa, 423 (1895), collision between wagon and street car, judgment for plaintiff in Linn District Court was affirmed, the facts of the case being stated by *DEEMER, J.*, as follows: "The defendant is a corporation owning and operating an electric street railway in the city of Cedar Rapids. One of its lines runs along Third street, from north to south; crossing, among other streets, Sixth avenue, which runs east and west. Between seven and eight o'clock in the morning of the 23d day of January, 1892, plaintiff, who was riding in an open, one-horse wagon, seated upon a high, spring seat, came down Sixth avenue, with his horse on a trot, going towards the west, in the direction of Third street. The morning was cold, and quite a frost was hanging to the trees and exposed places. The lots on the north side of Sixth avenue are well occupied with dwellings, and the east side of Third street, immediately north of Sixth avenue, is lined with a row of large trees. The view of Third street, north, coming west on Sixth avenue, is therefore very much obstructed; and except at but one place, which is but two or three feet wide, but little of Third street can be seen until the traveler has progressed far enough west on Sixth avenue to pass these obstructions to his vision. Plaintiff claims that, while in the exercise of due care on his part he attempted to cross Third street, and, while in the act of so doing, his wagon was struck by a passing car on defendant's line of road, and he was hurled to the ground with great force, which resulted in serious and permanent injuries. He charges that the defendant was negligent in running the car at a great rate of speed, to wit, thirty miles per hour, and in failing to ring the bell or sound the gong, or give other signals of the approach of the car, and in failing to slow up the car as it came to the crossing. And he further avers that the defendant's employees saw plaintiff was upon

the crossing long before the car struck his wagon, and that they did not apply the brakes, or make any attempt to stop the car, but carelessly and negligently ran the plaintiff down after discovering his position. The defendant denied each and all of these charges. The case was tried to a jury, and it returned a verdict for plaintiff, on which judgment was rendered, and defendant appeals. Error is assigned upon the instructions given, the instructions refused, and rulings in the admission and rejection of testimony." The court reviewed the case, but found no reversible error. It was held that persons crossing a street railway are not held to the degree of care required in crossing steam railroad, the question of contributory negligence being for the jury. It was also held that where the motorman saw plaintiff heedlessly approaching track without regard to warnings, and yet did not use ordinary care to avoid injuring plaintiff, defendant was liable notwithstanding plaintiff's negligence in failing to look for an approaching car. (Citing *Moore v. R. R. Co.*, 47 Iowa, 691; *Morris v. R. R. Co.*, 45 Iowa, 29; *Deeds v. R. R. Co.*, 69 Iowa, 164; *Romick v. R'y Co.*, 62 Iowa, 167; *McKean v. R. R. Co.*, 55 Iowa, 192; *O'Rourke v. R. R. Co.*, 44 Iowa, 531; *Cooper v. R. R. Co.*, 44 Iowa, 138; *Spencer v. R. R. Co.*, 29 Iowa, 55; *Davies v. Mann, 10 Mees. & W.* 546; *Keefe v. R'y Co.*, 92 Iowa, 182; *Burg v. R'y Co.*, 90 Iowa, 106; *O'Keefe v. R. R. Co.*, 32 Iowa, 468.)

LARKIN v. BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

Supreme Court, Iowa, May Term, 1892.

[Reported in 85 Iowa, 492.]

ORDINANCES — VIOLATION BY RAILWAY COMPANY — PUBLICATION — PROOF. — Section 492 of the Code provides that "all [city] ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council and the clerk," and that such "ordinances shall take effect and be in force at the expiration of five days after they have been published." *Held*, in an action against a railway company based upon the violation of a city ordinance, that the record provided by the above statute was not sufficient proof of the ordinance relied upon, when objected to by defendant, but that the burden was upon plaintiff to show due publication.

ORDINANCES — AMENDMENT. — Section 489 of the Code provides that "no ordinance or section thereof shall be revised or amended, unless the new evidence contain the entire ordinance or section revised or amended, and the ordinance or section so amended shall be repealed. *Held*, that an

amendment which adds nothing to nor takes anything from the section of an ordinance, but contains in full the section as it is designed to be when amended, is a sufficient compliance with the statute.

ORDINANCES — REGULATING SPEED OF TRAINS THROUGH TOWNS — REASONABLENESS. — The traveled portion of the highway at defendant's railway crossing was within the corporate limits of a town, and from that point the defendant's road extended southward parallel to a street of the town on the east. On the west side of the defendant's right of way the land was used for agricultural purposes. The evidence (in an action for damages against the railway company for injuries sustained at the crossing) did not show how far the right of way was fenced from the crossing towards the depot, nor the amount of travel upon the street to the east of it. *Held*, that an ordinance of said town prohibiting the operation of a passenger train within the limits of the corporation at a rate of speed not exceeding ten miles an hour, was not unreasonable.

COLLISION AT RAILROAD CROSSING — NEGLIGENCE OF DRIVER OF VEHICLE — CONTRIBUTORY NEGLIGENCE — INSTRUCTION. — Where plaintiff was injured in a collision between a carriage in which she was riding and defendant's train at a crossing, and it appeared that at the time of the accident plaintiff was riding in a carriage which she had hired, with a driver, of a liveryman, to take her to her destination, and there was a conflict in the evidence as to whose direction and control the driver was under: *Held*, that the court properly instructed the jury that, if the driver was guilty of negligence which contributed to the injuries in question, such negligence would prevent a recovery by the plaintiff only in case the driver was under her control, or in case she had the right to control and direct him.

APPEAL from Cedar District Court. The facts appear in the opinion. *Judgment reversed.*

WHEELER & MOFFIT and S. K. TRACY, for appellant.

R. G. COUSINS and CHAS. A. CLARK, for appellee.

Robinson, Ch. J. — In October, 1888, the plaintiff engaged at a livery stable in West Liberty, a team and driver to take herself and sister from that place to the home of their brother, several miles in the country. The driver furnished was a boy sixteen years of age, and the vehicle was a carriage which contained but one seat. That was occupied by the two sisters and the driver, plaintiff sitting on the left side. Elm street extends northward, from the vicinity of the depot in West Liberty, parallel to and about twenty rods east of the railway of defendant, a distance of three-fourths of a mile, a public highway known as the "Muscatine and Iowa City road," which extends across the railway track from east to west. A cut-off, leaving Elm street some fifteen or twenty rods south of the highway, leads into it at a point about 150 feet east of the track. A person traveling northward on Elm

street can see the railway track south of the highway, but the view north of it is so obstructed by trees, shrubbery and embankments that the track is hidden. At a point 369 feet north of the point where the highway crosses the railway, the latter is in a cut thirteen feet nine inches deep. From that point the surface of the ground slopes southward to the crossing. When half way from the cut-off to the crossing the traveler on the highway could see a train only a few rods north of the crossing. At the time in question the carriage in which plaintiff was riding was driven northward on Elm street, and westward on the Muscatine road, to the crossing. There it was struck by a train of defendant moving southward. The plaintiff was seriously injured, and her sister and the driver were killed. The plaintiff charges that the train approached the crossing through the cut at a dangerous and reckless rate of speed, without the blowing of a whistle or the ringing a bell; that the rate of speed was in violation of an ordinance of the town of West Liberty; and that in so operating it defendant was negligent.

1. At the time of the accident the town of West Liberty was incorporated, and the north boundary line of its corporate limits was the center of the highway where the accident occurred. At that place the traveled part of the road was south of its center. The train which caused the accident was running from twenty-five to thirty miles an hour at the time, and was supplied with the latest and best-known air brakes, which were in good order. The plaintiff was permitted to introduce in evidence so much of the ordinance book of the town of West Liberty as showed ordinance numbered 32 and an amendment thereto. They provided that no locomotive attached to a passenger train using air brakes should be allowed to run, within the limits of the corporation, at a rate of speed greater than ten miles an hour. The defendant insists that it was not shown that the ordinance had been adopted and published as required by law, and that it was unreasonable. Section 1, c. 128, Acts 19th Gen. Assem., provides that a book or pamphlet containing the ordinances of a city or town organized under the general incorporation laws of the State, published by said city or town, shall be received as evidence of the passage and legal publication of such ordinances; but no evidence of that kind was offered. Section 492 of the Code provides as follows: "Sec. 492. All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be

authenticated by the signature of the presiding officer of the council and the clerk; and all by-laws of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper of general circulation in the municipal corporation; and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture to show that no such publication was made * * * And such by-laws and ordinances shall take effect and be in force at the expiration of five days after they have been published." The minute book of the town council and the ordinance book showed that the ordinance was passed and properly recorded and authenticated in May, 1874, but no publication in a newspaper or otherwise was shown. .

This is not a suit or prosecution for any fine, penalty, or forfeiture authorized by the ordinance; hence the provision of the section quoted which applies to actions of that kind does not apply in this case. In *State v. King*, 37 Iowa, 469, a prosecution for the sale of beer in violation of an ordinance, it was said that the ordinance, as found in the proper book of the town, and offered in evidence without objection, was to be considered *prima facie* valid and in force. But it was also said that its validity could have been questioned by objections made when the record was offered or by evidence in defense. In this case defendant might have shown that the ordinance had never been published as required by law, but, if the record offered was not *prima facie* evidence that the ordinance was in force, it was not required to do so; the burden being upon plaintiff to show due publication.

It is said it will be presumed that the officers of the town discharged their duty by making publication of the ordinance as required by law. It will be presumed, where publication in a newspaper is shown, that the newspaper was one of general circulation, and when the ordinance is sufficiently certified that it was duly recorded. *Town of Bayard v. Baker*, 76 Iowa, 222. It will also be presumed that a record of the council in regard to the passage of the ordinance is correct. *Town of Eldora v. Burlingame*, 62 Iowa, 35. And no doubt there are other facts of a preliminary or incidental nature, and essential to final action, which will be presumed when such action is shown; but the statute under consideration does not authorize such a presumption. It provides that proof that the required publication has not been

made shall be a sufficient defense to any suit or prosecution for a fine, penalty or forfeiture. It cannot be said, however, that such a defense would not avail in any other case, for the reason that the statute also provides that by-laws and ordinances requiring publication shall take effect and be in force at the expiration of five days after they have been published; and it necessarily follows that they would not take effect before that time. But an ordinance cannot command nor forbid before it takes effect. Until that time, so far as the public is concerned, it is a mere nullity, creating no obligation or liability. Therefore, in any case in which the prosecutor or plaintiff depends upon the effect of an ordinance which the law required to be published, proof that publication had not been made would establish a sufficient defense. In order to give all parts of the statute under consideration effect, the theory that such a defense can be made only to an action for a fine, penalty or forfeiture must be rejected. A better, and, in our opinion, the proper, interpretation is that in the class of actions referred to the publication of the ordinance need not be shown, but will be presumed from proof that it was duly passed, recorded, and authenticated, and that the burden of rebutting that presumption is upon the defendant, while in other cases where objection is made no presumption of that kind exists, but the ordinance must be proven as any other material and disputed fact. It may be said there is no sufficient reason for distinction between the two classes of cases, but that was a question for the general assembly to determine and we need not concern ourselves with it.

2. The part of the ordinance which limits the rate of speed was contained in an amendment which was intended to be a substitute for one section of the original ordinance. The defendant objected to it for the reason that it does not contain the ordinance which it was designed to amend. Section 489 of the Code provides that "no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section reviewed or amended, and the ordinance or section so amended shall be repealed." The new ordinance does not attempt to amend the old by adding to or taking from one of its sections; but contains in full the section as it was designed to be when amended. That was a sufficient compliance with the statute. *Town of Decorah v. Dunstan*, 38 Iowa, 96.

3. A further objection to the ordinance made by defendant is

that it is unreasonable. The crossing was three-fourths of a mile from the depot. The evidence tended to show that the right of way of defendant was fenced on each side. It is fenced north of the crossing, and also southward towards the depot. The town of West Liberty is almost wholly east of the railway, none of the streets extending across it, and but few houses are on the west side. There is a private crossing between the place of the accident and the depot. The land west of the right of way is used for agricultural purposes, and that between it and Elm street is occupied by two houses, and is otherwise used as a common. It is said that, in view of these facts, it was unreasonable to require defendant to operate its passenger train three-fourths of a mile from the depot at a rate of speed not exceeding ten miles an hour, and the case of *Meyers v. Railroad Co.*, 57 Iowa, 556, is relied upon as a case in point. In that case an ordinance which prohibited the running of a railway train at a higher rate of speed than four miles an hour for a distance of three miles through agricultural lands outside the inhabited portion of the city, on a track fenced on both sides, was declared to be unreasonable. In this case it is not shown how far the right of way is fenced from the crossing towards the depot, nor is it shown how much crossing of the right of way there is, nor the amount of travel on Elm street. Where the record is silent as to material facts, they must be presumed to tend to justify the ordinance. Elm street may be one of the main thoroughfares of the town, and the travel from it on the Muscatine road over the crossing may be large. That the crossing is a dangerous one, when trains from the north are permitted to pass it at a high rate of speed is evident. One-half of the crossing, and all that part of it used by teams at the time of the accident, was within the corporate limits of the town of West Liberty, and it was the duty of the town to protect, so far as it had power, persons who used the crossing. In view of all the facts in the case, we cannot say that, as a matter of law, the ordinance was unreasonable.

4. The jury were instructed that, if the driver was guilty of negligence which contributed to the injuries in question, such negligence would prevent a recovery by the plaintiff only in case the driver was under the control and direction of plaintiff, or in case she had the right to control and direct him. It is insisted that this was erroneous, and that as a matter of law, under the undisputed facts of the case, the negligence of a driver was

imputable to plaintiff. She was a resident of the State of Pennsylvania at the time of the accident, and had no knowledge of the proper route to take to reach her brother's residence. That matter was left to the determination of the liveryman and his driver. She gave the driver no directions as to the course to take, and assumed no control over him. The liveryman claimed that he had no control over the driver after he left the stable. There was a conflict in the evidence as to who controlled him, which was rightly submitted to the jury for determination. See *Nesbit v. Town of Garner*, 75 Iowa, 315.

5. Appellant complains of the eighth paragraph of the charge on the ground that it relieved plaintiff of the burden of showing herself free from contributory negligence. But the sixth paragraph of the charge instructed the jury as to the obligation upon plaintiff in that respect and the paragraph of the charge complained of was not misleading. For the error in admitting in evidence the record of the ordinance, without further proof, the judgment of the District Court is reversed.

ROTHROCK and KINNE, JJ., concur in the result, but do not wish to be considered as bound by the views expressed in the fourth division of the opinion.

COLLISION BETWEEN VEHICLE AND HORSE ON HIGHWAY — LIABILITY — RULE OF THE ROAD. — In *RIEPE v. ELTING*, 89 Iowa, 82 (1893), collision between vehicle and a horse, by which the latter was killed, judgment for plaintiff, in an action to recover value of the horse, was affirmed (two justices dissenting). The case is sufficiently stated in paragraph 4 of the syllabus of the official report (ROBINSON, Ch. J., rendering the opinion of the court), as follows: "The plaintiff's two sons were riding the plaintiff's horses towards the west, upon a public highway, in the night-time, when they heard the defendant approaching them rapidly from the west with a vehicle, but could not see him on account of the darkness. There was a space of about ten feet between the traveled part of the road and the fence on the north, and one of the boys, who was riding a light bay horse, turned to the right into this space, while the other boy, who was riding a black horse, turned to the left, so that he was about ten feet south of the traveled track when his horse was struck and killed by the shaft of the defendant's vehicle, the defendant having turned to his own right when meeting the boys. In an action by the plaintiff to recover the value of the horse, it was *held* that, in view of all the

circumstances, the court properly submitted to the jury the question of the defendant's negligence, and that of the contributory negligence of the boy who rode the horse, and that a verdict for the plaintiff would not be set aside on appeal, as being unsupported by the evidence. (ROTHROCK and GRANGER, JJ., dissenting.)" The court discussed very fully the rule of the road, citing statutes and authorities, and its ruling is stated in paragraph 2 of the syllabus of the official report as follows: "Although section 1000 of the Code provides that persons meeting each other on public highways shall give one-half of the same by turning to the right, and that persons violating such provision shall be liable for all damages resulting therefrom, and shall also be liable to a fine, upon the prosecution of the person wronged, yet the fact that one who is traveling on horseback, in the night-time, turns to the left, when he hears another approaching with a vehicle, is not conclusive evidence of negligence on his part, so as to preclude a recovery for his horse, when killed by a collision with the vehicle."

BANNING, ADM'X V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Supreme Court, Iowa, October Term, 1893.

[Reported in 89 Iowa, 74.]

CROSSING RAILROAD TRACK—STOP, LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE. — Where one is about to cross a railroad track, and knows that there are obstacles which may prevent his seeing an approaching train, and there is nothing to prevent his stopping and listening, and his attention is in no way diverted by surrounding circumstances from listening, and it appears that, if he had listened, the injury which he received would have been avoided, the failure to listen constitutes such negligence as will defeat a recovery.

VIEW OF PLACE OF ACCIDENT BY JURY — DISCRETION OF COURT. — In an action for the death of the plaintiff's intestate upon a railroad crossing, the court permitted the jury to view the scene of the accident; to which the defendant objected, on the ground that the premises might have been changed in the meantime. *Held*, that in the absence of evidence to the contrary it must be presumed that the situation remained unchanged, and that permitting a view in such cases is a matter so much within the discretion of the trial court that this court cannot interfere, where no abuse of that discretion is shown.

WARNING OF DANGER — SPECIAL INTERROGATORY. — Where the evidence showed that, as the plaintiff's intestate was approaching the crossing, some one remarked, "You had better hold up; the train is coming," it was error for the court to submit to the jury the question whether the deceased had reason to believe that the remark was addressed to parties other than himself, as the only material question was whether he heard it.

INSTRUCTION — CONTRIBUTORY NEGLIGENCE. — An instruction that the defendant would not be liable if the injured party, by his negligence, "substantially" or "materially" contributed to the injury, was erroneous, the rule being that, if the injured party contributes in any way, or in any degree, directly to the injury, there can be no recovery.

ELEMENTS OF NEGLIGENCE — INSTRUCTIONS. — Where the court had, in one instruction, taken from the jury certain elements of negligence as charged in the petition, it was error, in other instructions, to tell the jury that the plaintiff could recover if she showed that the death of her intestate was the result of one or more acts of negligence charged in the petition.

INSTRUCTION — COMPARATIVE NEGLIGENCE. — An instruction intended to cover a case where the defendant is negligent after being aware of the negligence of the injured party, *held*, erroneous, because there was no evidence on which to base it, and because it was so worded as to cause the jury to institute an inquiry as to the comparative negligence of the defendant and the deceased; the doctrine of comparative negligence not being recognized in this State.

APPEAL from Audubon District Court. The facts appear in the opinion. *Judgment reversed.*

NASH, PHELPS & GREEN and WRIGHT & BALDWIN, for appellant.

THEO. F. MYERS and F. E. BRAINARD, for appellee.

Kinne, J. — 1. Plaintiff's intestate, J. E. Banning, a man fifty-three years old, was on December 4, 1890, injured by a car of defendant, which was being kicked along and upon its side track at Audubon, Iowa (1). He died on the 8th of said month. Defendant's depot in said town is situated at the end of Broadway street. At the east side of defendant's right of way, and running past the end of said street, there is a side track of defendant. There is a sidewalk on the south side of said street leading to the defendant's depot, which crosses the side track before mentioned, and it was at this crossing that the accident occurred.

1. *Person struck by train — Damages* — *Pain and suffering.* — In DWYER, ADM'R v. CHICAGO, ST. PAUL & O. R'Y Co. 84 Iowa, 479 (1892), action for injuries sustained by plaintiff's intestate who was struck by defendants' cars, the point decided was as to damages for pain and suffering, it being held that "pain and suffering are not proper elements of damage to be considered in an action, commenced by the administrator of the injured party, to recover damages to the latter's estate because of death from the injuries sustained." The jury returned a general verdict for plaintiff for \$3,000, and specially found that \$2,300 of the amount was for "pain and suffering," and \$700 "as damages to the estate." The Supreme Court remanded the cause to the Plymouth District Court, with instructions to deduct from the judgment entered the \$2,300 allowed for pain and suffering, and give judgment for the balance.

It appears also that this is the only walk from the town which extends to the depot. There are a warehouse and some coal sheds south of said walk, and adjacent to said side track, which obstruct the view of one approaching the depot on said sidewalk as to trains of defendant south of said crossing and depot, which can only be seen after passing said buildings. It appears that the train was to leave at ten o'clock A. M. Plaintiff's intestate was going to the depot for the purpose of taking passage thereon. At about a half hour prior to the time for the departure of the train on December 4, 1890, plaintiff's intestate went west on the sidewalk towards the depot. He was running, or, as some of the witnesses say, was on a "dog trot." As he approached said track, a freight car of defendant, which had been detached from the train, was being kicked along and upon said side track, and was crossing at the foot of Broadway and the sidewalk when the plaintiff's intestate arrived at the same point. He ran against the car, and was knocked down, and dragged for some distance. The particular acts of negligence charged against the defendant are: First, the constructing of its side track so near the warehouse and sheds; second, that the switch track was sunk where it crossed the street, so as to leave a ridge of dirt about a foot high on the east side of it; third, failure to keep a flagman or watchman at the place where the side track crossed the sidewalk; fourth, that no brakeman was on the detached car; fifth, that the train which was propelling the car was running at a negligent rate of speed. It appeared that deceased was a farmer and carpenter; that he was not familiar with the depot grounds of defendant, though he had come to Audubon on the train, and hence must have had some knowledge as to the defendant's tracks and grounds; that the sidewalk on which he was going to the depot when injured was built and maintained by the defendant, and had been used by the public for more than ten years as a public crossing; that he died as a result of the injury. Damages were claimed in the sum of \$10,000. Defendant denied generally, and alleged that the injury complained of was caused and contributed to by the deceased. At the conclusion of the testimony, defendant moved the court to direct a verdict for it, which motion was overruled. Over defendant's objection, the jury were permitted to view the locality of the accident. Certain special interrogatories, asked by both parties were submitted to the jury.

2. Error is assigned on the refusal of the court to direct a

verdict for the defendant. The motion to direct a verdict was based upon the negligence of deceased, which contributed to the accident, and a failure to establish negligence on part of the defendant. It appears that, when Banning was running towards the depot, he was warned that a train was approaching, but he did not heed the warning. The evidence, without conflict, shows that the whistle was sounded several times, and the bell rung. He paid no attention to these signals of danger, if he heard them, but kept on until he collided with the moving car. He knew he was approaching a railroad track, always a place of danger, and it was his duty, even in the absence of any special warning, or of the giving of signals of those in charge of the train, to use his sense of hearing as well as of sight. Whether or not he heard the train will never be known. It does not appear that his sense of hearing or seeing was in any way impaired, and, if he had stopped and listened, he would have certainly heard the train, and avoided the accident. The slightest observation would have shown him that his duty to listen was all the more necessary by reason of the obstructions which would prevent him from seeing the train until it had arrived at the street line; yet he took no care to protect himself from danger by stopping and listening, but rushed heedlessly on to his death. Some six men, besides the railroad employees, testified to the blowing of the whistle and ringing of the bell. They all knew a train was near, and some of them were waiting for it to pass when deceased was approaching the track. But the signals given by the train were not the only warnings that deceased had. Before he reached the train he was told to hold up; that a train was coming. He looked towards the speaker, made no reply, and continued running towards the track. As others, no more favorably situated than he, heard the signals of the approaching train, it must be presumed that, if he had listened, he also would have heard them. There is no evidence that deceased took any steps whatever to ascertain if the train was coming. Even though he was approaching a railroad depot for the purpose of taking passage upon a train, still he was bound to know that it was a place of known danger, and to make reasonable use of his senses of sight and hearing for the preservation of his person from harm. The jury, in a special finding, say they do not know whether deceased listened or not. It is true that a failure to look and listen will not always defeat a recovery. But where, as in this case, one is

about to cross a railroad track, and knows that there are obstacles which may prevent his seeing an approaching train, and there is nothing to prevent his stopping and listening, and his attention is in no way diverted by surrounding circumstances from listening and it appears that, if he had listened, the injury would have been avoided, the general rule must be held to apply that a failure to listen constitutes such negligence as will defeat a recovery. As supporting this rule, we refer to the following cases. *Lang v. Mining Co.*, 49 Iowa, 469; *Artz v. Chic., R. I. & P. R'y Co.*, 34 Iowa, 153; *Dodge v. Chic., R. I. & P. R'y Co.*, 34 Iowa, 276; *Carlin v. Chic., R. I. & P. R'y Co.*, 37 Iowa, 316; *Payne v. Chic., R. I. & P. R'y Co.*, 39 Iowa, 523; *Haines v. Ill. Cent. R'y Co.*, 41 Iowa, 227; *Benton v. Cent. Iowa R'y Co.*, 42 Iowa, 192; *Funston v. Cent. Iowa R'y Co.*, 61 Iowa, 452; *Schaefer v. Chic., M. & St. P. R'y Co.*, 62 Iowa, 624; *Griffin v. Chic., R. I. & P. R'y Co.*, 68 Iowa, 638; *Sala v. Chic., R. I. & P. R'y Co.*, 85 Iowa, 678. There is no evidence that defendant knew, or by the exercise of reasonable care could have known, that deceased was about to attempt to go upon the track, regardless of the moving car. The motion should have been sustained. The plaintiff had failed to establish an element in her case essential to her recovery — the freedom of deceased from negligence which contributed to produce the injury. As we have endeavored to show, if the deceased had not been guilty of negligence, this accident would have never happened.

3. It is said that the court erred in permitting the jury to view the scene of the accident. It is insisted that the premises may have been different when viewed by the jury from what they were when the accident occurred. The evidence does not sustain the contention. For aught that appears, the premises were in all respects as when the injury resulted. Certainly, in the absence of evidence to the contrary, we may well presume that there had been no change. This matter of permitting a view is so much in the discretion of the trial court that we should not be justified in interfering with its action in that respect unless an abuse of that discretion is shown. No such case is made in this record.

4. The fourteenth interrogatory should not have been submitted to the jury. It read : " Did the decedent, J. E. Banning, have reason to believe that the remark of O. Kennels, if any was made, was addressed to parties other than himself?" The jury answered this, " Yes." The remark referred to was:

“You had better hold up; the train is coming.” Now, it was entirely immaterial to whom the remark was addressed. The real question is, Did the deceased hear the remark? If so, it being a warning of impending danger, he was in duty bound to heed the admonition, as much so as if it had been directed to him. The only evidence which can be said to tend to show that the remark was not addressed to the deceased is that of a witness who says he thought the remark was addressed to him (the witness), not to the deceased. But as we have said, it is not material to whom it was made if the deceased heard it.

5. The jury were told in the third instruction that defendant would not be liable if the injured party “substantially” contributed to the injury. In the fifth instruction they were told it was incumbent on plaintiff to show that deceased was not guilty of negligence which “materially” contributed to the accident. The same thought is also found in the eleventh instruction. These instructions are all erroneous. The rule is that, if the injured party contributed in any way or in any degree directly to the injury, there can be no recovery. *McAunich v. Miss. & Mo. R’y Co.*, 20 Iowa, 338; *Haley v. Chic. & N. W. R’y Co.*, 21 Iowa, 15. Now, the rule given the jury was that plaintiff’s intestate’s negligence, in order to defeat recovery, must have materially or substantially contributed to produce the injury; that is, the negligence of deceased must have contributed “in an important degree” to the injury in order to prevent a recovery. Such is not the law in this State. *Artz v. Chic., R. I. & P. R’y Co.*, 38 Iowa, 296.

6. In the fourth instruction the court takes from the jury, as elements of negligence, the charge of the construction and maintenance of the side track near the warehouse, also the charge as to the bank of earth east of the track; yet afterwards the jury are told that plaintiff could recover if she showed by a preponderance of the evidence that the death of her intestate was the direct or proximate result of one or more acts of negligence charged in the petition. The jury should have been confined to the charges of negligence remaining after eliminating those mentioned in the fourth instruction.

7. We do not think the testimony justified the giving of the eighth instruction. It seems to have been intended to cover a case where there was evidence to show that the defendant was negligent after being aware of the negligence of the injured party.

There was no evidence tending to establish such a state of facts. The instruction was erroneous in another respect, in that it was so worded as to cause the jury to institute an inquiry as to the comparative negligence of the deceased and the defendant. The doctrine of comparative negligence is not followed in this State; and if the deceased contributed directly in any degree, or to any extent, in producing the injury, plaintiff cannot recover.

The judgment below must be reversed.

PEDESTRIAN INJURED AT RAILWAY CROSSING — ABSENCE OF FLAGMAN — CONTRIBUTORY NEGLIGENCE — SIGNALS — STATUTE. — In *SALA v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.*, 85 Iowa, 678 (1892), pedestrian crossing railway track struck by engine, judgment for defendant was affirmed, the Supreme Court holding that plaintiff was guilty of contributory negligence. The court (per ROBINSON, Ch. J.), stated the facts as follows: "On the 15th day of August, 1889, the defendant was operating a railway in the city of Muscatine. Its track, extending from the northeast in a southwesterly direction, crossed Second street, which extends from north to south, on a grade about four feet higher than the general level of the street in that vicinity. Twenty-four feet north of the main track the street was also crossed by a side track on a level four feet lower than that of the main track. On the west side of the street was a sidewalk, near that was a street railway track, and east of that was the portion of the street used by wagons. South of the main track of defendant were a number of lumber piles, of which the nearest was fifty feet from the track, a telephone pole, and some trees. North of the side track were lumber piles, warehouses, and factories, and near the crossing was a flagman's station and building. The view of the railway east of the crossing was somewhat obstructed by the objects named, but at a point on the sidewalk 105 feet south of the main track a person could see it for a distance of 650 feet, and from a point fifty feet south it could be seen for a distance of 1,200 feet. At half-past five o'clock in the morning of the day specified, the plaintiff left her home near the street railway to participate in a fireman's excursion to Moline. Before she reached the street railway a car passed, but she waited for a Miss Simmons, who was a short distance away, to join her, and made no effort at that time to stop the car. When she was joined by Miss Simmons a signal to stop the car, which was then distant about one block, was given. In response to the signal the car was stopped south of the main track, and the driver called to plaintiff and her companion to hurry; but, seeing a freight

train approaching from the east, he drove to the north side of the track, and there stopped. The plaintiff and Miss Simmons walked rapidly, and, as they attempted to cross the track of defendant, were struck by the engine. Miss Simmons was killed, and plaintiff received serious injuries, some of which are permanent. She asks to recover damages for those injuries. The train in question approached the crossing at a speed of from twenty to twenty-five miles an hour, without the ringing of a bell. Ordinances of the city of Muscatine forbade the running of trains within the city limits at a higher rate of speed than six miles an hour, and required that when a locomotive passed through the city its bell should be constantly sounded. The defendant was also required to have a flagman at the crossing in question. The evidence submitted would have authorized the jury to find that defendant was negligent in operating its train at too high a rate of speed, and in permitting it to approach the crossing without giving proper warning. But it is insisted by defendant that the negligence of plaintiff contributed to the accident, and the District Court, in charging the jury to return a verdict for defendant, acted upon that theory. It is clear that had plaintiff used reasonable diligence to ascertain if a train was approaching, or had exercised but slight care to ascertain the fact, the danger would have been avoided. It is true she testifies that "just as we got past the lumber piles I looked both up and down the track, and the last I know I was down; I didn't know what struck me at the time;" and also that she looked more than once; but the evidence shows conclusively that she could not have looked to the eastward with any degree of attention. Conceding the claim made in her behalf that the side track was usually full of cars, and may have been at the time in question, we think plaintiff could not have mistaken a locomotive, and freight cars attached, moving at the rate of twenty or more miles an hour, for stationary cars standing on a track four feet lower, and partially hidden from view by the embankment on which the main track was built. When plaintiff was thirty-five feet from the crossing she could have seen the track in a northeasterly direction for a distance of 1,200 feet, and the locomotive which struck her could not have been more than 300 feet away, and probably was not half so far as that, and on a level three or more feet higher than that on which plaintiff was walking. Had she looked in the direction of the train she must have seen it, and would have known at once the danger she would incur in attempting to cross the track. It was so apparent to others in the street car and on the sidewalk that it did not occur to them that it could be unknown to her, and no warning was given. It is indeed

most strange that she and her companion could have walked a distance of more than 100 feet, with nothing whatever to obstruct their view of the train, without either hearing or seeing it. In consequence of the position of the car which they were seeking to overtake, and the direction in which the train of defendant approached the crossing, their faces, and especially that of plaintiff, would naturally have been turned somewhat towards the train, and when they were near the crossing they could not have looked towards the street car without seeing the train. Miss Simmons was on the side towards the train, but not so as to obstruct plaintiff's view of it. They were talking with each other, laughing, and hurrying to overtake the car, and their attention was thus probably diverted from all thought of danger. Plaintiff was about twenty-one years of age at the time. Her hearing and eyesight were good. She was apparently intelligent, and from frequent use was thoroughly acquainted with the crossing. For several years immediately preceding the accident, defendant had kept a flagman at the crossing to warn passengers of danger, and plaintiff had never been there before when a train was passing without seeing him. There was no flagman at the time of the accident, and plaintiff states that she "noticed no flagman, and went on:" but it is clear that she did not rely upon his absence as an assurance of safety, for she not only does not claim that she thought no train was approaching because he was not there, but, on the contrary, she says she looked both ways for a train, and more than once; also that "it is not a fact that I did not look nor listen nor think of the train. That is something I never do without looking for the train." She would not have been justified, however, in relying wholly upon the absence of the watchman as an assurance of safety. Usually the street cars were not run so early in the morning, and the watchman did not go on duty until six o'clock. A railway crossing is apt to be a place of danger, and the persons using it should not omit the precaution of looking for an approaching train before going onto the track, when they may do so without inconvenience, even though a watchman should be present to give notice if a train is approaching. The absence of the watchman should not be regarded as an invitation to cross without looking for danger. Such a case is distinguishable from one where the watchman is present, and by a signal to cross, or by a failure to give any signal when he sees a crossing attempted gives assurance, either express or implied, that it can be made without danger. But in *Cadwallader v. Railway Co.* (Ind. Sup.), 27 N. E. Rep. 161, the Supreme Court of Indiana held that a person who attempts to cross a railway track without looking for a train, for

the reason that the watchman gave no signal, receiving injuries in the attempt, was guilty of such contributory negligence as to prevent a recovery. We conclude that the undisputed facts of the case show that plaintiff contributed to the accident by her own negligence. Some of the rulings of the District Court in admitting and excluding evidence are objected to, but, had they been as plaintiff insists they should have been, the result could not have been other than it is." * * * The court also held that the omission of the duty to give signals imposed upon railroad companies when locomotives approach crossings (section 1, c. 104, Acts 20th Gen. Assemb.), will not render a railroad company liable for personal injuries sustained at railroad crossing without regard to negligence of person injured. Judgment affirmed. JAYNE & HOFFMAN appeared for appellant; J. CARSKADOAN and THOS. F. WRIGHT, for appellee.

PEDESTRIAN INJURED CROSSING TRACK — LICENSE — TRESPASSER — LIABILITY OF RAILROAD. — In CLAMPIT v. CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO., 84 Iowa, 71 (1891), pedestrian injured while crossing railroad track, judgment for plaintiff was affirmed. The facts, as stated by BECK, Ch. J., are as follows: "The plaintiff, a carpenter, in going from his house, in Des Moines, to the place where he was employed in the same city, was accustomed to cross the Des Moines Union Railway, which was used by defendant in transporting its cars to its station house in Des Moines. The crossing of the railway tracks was made by plaintiff on foot, at a place much used by pedestrians, just at the foot of a bluff or bank which was approached by a stairway constructed by persons using the footway. While crossing the railway, when going to his work, according to his custom, he was struck by an engine and seriously injured. Counsel for defendant maintain that plaintiff was not rightfully upon the railway track, and was a trespasser when he received the injury, and therefore cannot recover in this action. The place where the accident occurred was in the city of Des Moines, and was daily used by a number of persons employed at the pork house, and other places in that part of the city, in going to and returning from their work. It had been used for a considerable time by such persons and others, who, or some of whom, as we have just stated, constructed a stairway down by the track for their own use, and for other pedestrians using the footway. A crossing of the ditch near the track was constructed, by whom is not shown, of railroad ties, and was used until just before the accident. It is shown that pedestrians crossed the track

at other places, just as they always do when the track is not fenced, or other impediments are not in the way to prevent them from doing so. There were no fences along the road, and nothing to prevent all persons desiring to do so crossing the road freely. The defendant and the railroad company owning the track, or either, had in no manner forbidden the crossing of the track by footmen, and had thrown no obstacles in their way. The fact that the place at the stairs was used as a crossing by pedestrians, who also crossed at other places near by, was known by the employees of defendant, and by the engineer who operated the engine which struck plaintiff. The stairway and the ties cross the ditch, as well as the path made by footmen, prominently advertised the place as a crossing used by pedestrians. No engineer or fireman passing along the tracks at that place with his eyes open, in the exercise of reasonable watchfulness and care, could have failed to see these indications of a footpath, and to understand therefrom that it was used by pedestrians, if he possessed ordinary intelligence. The defendant, and the railroad company owning the track, having through their employees and officers knowledge of the use of the footpath crossing, and having made no objections thereto, nor erected fences, walls, or other obstructions to such use, will be presumed to assent to it; thus giving all who use the crossing license therefor. Plaintiff, therefore, was not a trespasser upon the railroad track, but is entitled to all the rights and protection of one rightfully upon it with the license of defendant. He may recover for injuries resulting from defendant's want of care, if not contributing thereto by his own negligence. In support of these views, see the following cases: *Donaldson v. Mississippi & M. R'y Co.*, 18 Iowa, 280; *Murphy v. C. R. I. & P. R'y Co.*, 38 Iowa, 539; *Evans v. Burlington & M. R. R'y Co.*, 21 Iowa, 374; *Townley v. Chic. Mil. & St. P. R'y Co.*, 53 Wis. 626; *Davis v. Chic. & N. W. R'y Co.*, 58 Wis. 646; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289; *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Troy v. Cape Fear & Y. V. R'y Co. (N. C.)*, 6 S. E. Rep. 77, and cases cited in notes; *Virginia M. R'y Co. v. White's Adm'r (Va.)*, 5 S. E. Rep. 573; *South & N. A. R'y Co. v. Donovan (Ala.)*, 4 Southern Rep. 142; *Pennsylvania & R. R. Co. v. Troutman*, 11 Wkly. Notes Cas. 453; *Taylor v. Delaware & H. Canal Co. (Pa. Sup.)*, 8 Atl. Rep. 43; *Bellefontaine & I. R'y Co. v. Snyder*, 18 Ohio St. 399; *Harriman v. Pittsburg, C. & St. L. R. Co. (Ohio Sup.)*, 12 N. E. Rep. 451; *Stewart v. Pennsylvania R. Co. (Ind.)*, 14 Am. & Eng. R. Cas. 679, and cases cited in notes; *Shear. & R. Neg.* 493; *Patt. R'y Acc. Law*, 178.

“ But if plaintiff, when he was injured, was upon the track without right or license, this did not relieve defendant from the duty of exercising proper care to avoid the accident, and, if it occurred through defendant's negligence, it is liable. *Isabel v. Hannibal & St. Jos. R'y Co.*, 60 Mo. 480; *Harlan v. St. Louis, K. C. & N. R'y Co.*, 65 Mo. 22; *Hicks v. Pacific R'y Co.*, 64 Mo. 430; *Brown v. Hannibal & St. Jos. R'y Co.*, 50 Mo. 461; *Pennsylvania R'y Co. v. Lewis*, 79 Pa. St. 33; *South & N. A. R'y Co. v. Donovan* (Ala.), 4 Southern Rep. 142. The evidence fails to show negligence on the part of plaintiff contributing to the injury, as claimed by plaintiff's counsel. He stopped and looked each way for cars, and saw none. It does not appear that any whistle was sounded. The engineer and fireman testify that the bell was rung, but plaintiff states in his testimony that, while he was hard of hearing, he could readily hear an engine bell fifty yards, and that he heard none. The engine was running backwards, and neither engineer nor fireman was looking out on the side of the track he was approaching. The evidence tends to show that the engine was running at a high rate of speed, forbidden by the city ordinance. These considerations and others support the conclusion, doubtless reached by the jury, that defendant is chargeable with negligence, and that plaintiff did not contribute by his own negligence to the injury. Defendant's motion for a verdict was rightly overruled.” * * * Judgment affirmed.

NOTES OF IOWA CASES RELATING TO COLLISIONS AND CROSSINGS AND ACCIDENTS ON TRACK.

In addition to the Iowa cases relating to Collisions and Crossings, reported in this volume, *ante*, see the following notes and abstracts of cases on the same topics:

COLLISION BETWEEN TRAIN AND VEHICLE AT CROSSINGS — DUTY OF TRAVELER — STOP, LOOK AND LISTEN. — In *SPENCER v. ILLINOIS CENTRAL R. R. CO.*, 29 Iowa, 55 (1870), action for injury to plaintiff and his mules and wagon caused by collision with train while crossing track, it was held that the following instruction was erroneous to defendant's prejudice, in failing to state the law fully on the subject of plaintiff's negligence precluding recovery where it contributed to the injury: “It is incumbent upon the plaintiff to use all reasonable care and prudence in crossing the track, and particularly at stations where there is a probability of there being trains; and the want of such care and prudence on the part of plaintiff, if it tended to cause the injury, will be taken into consideration by the jury in determining the liability of the company.” It was also held that while it is the duty

of a person in crossing a track to use all reasonable precaution to ascertain whether a train is approaching, he is not, as matter of law, bound to stop his team and look and listen before attempting to cross. Judgment for plaintiff for \$1,000 reversed.

COLLISION WITH TRAIN AT CROSSING — SPEED OF TRAIN NOT NEGLIGENCE *PER SE*. — In **MCKONKEY v. CHICAGO, BURLINGTON & QUINCY R. R. CO.**, 40 Iowa, 205 (1875), action for damages for injuries to plaintiff's horse caused by collision with defendant's train, due to alleged rapid running of train at crossing, it was held that "in the absence of any statute limiting the rate of speed of railway trains, no conceivable rate of speed is evidence of negligence *per se*," and judgment for plaintiff for \$85 was reversed, for erroneous instruction on the question of speed. (Citing **FLATTES v. CHICAGO, R. I. & P. R'y Co.**, 35 Iowa, 191; **LATTY v. B. C. R. & M. R. Co.**, 38 Iowa, 250).

But in **ARTZ v. CHICAGO, R. I. & PAC. R'y Co.**, 44 Iowa, 284 (1876), it was held that "while unusual speed of railway trains does not of itself constitute negligence, yet it may be considered with other circumstances in determining the degree of care exercised." (Citing **WILSON v. B. & M. R. R. Co.**, 33 Iowa, 591; **PLASTER v. ILL. CENT. R. R. Co.**, 35 Iowa, 449).

The **ARTZ** case (*supra*), was an action for injuries sustained in collision with train while driving across track, in which plaintiff recovered \$7,100 damages. There were two previous trials, in the first of which plaintiff recovered \$5,000, and in the second, \$5,500. See 34 Iowa, 154, and 38 Iowa, 293. Judgment affirmed.

OBSTRUCTIONS ON TRACK. — It was held in **ARTZ v. CHICAGO, ROCK ISLAND & PACIFIC R'y CO.**, 44 Iowa, 284 (1876), collision at crossing, that "the questions whether or not there were obstructions obscuring the sight of an approaching train to one about to drive upon the track, and whether or not plaintiff, under the admitted facts, was using his senses to avoid danger, are questions of fact for the jury" (two justices, however, dissented, citing **BENTON v. CENTRAL R. R. Co.**, 42 Iowa, 192).

ACCIDENT AT CROSSING — HORSE FRIGHTENED BY NOISE OF TRAIN — SIGNALS AT CROSSING — INSTRUCTION. — In **HART v. CHICAGO, ROCK ISLAND & PACIFIC R'y CO.**, 56 Iowa, 166 (1881), two actions, one by Louisa A. Hart and the other by John P. Hart, for injuries sustained at defendant's crossing, due to horses becoming frightened by noise of train, escape of steam, and bell, judgments for defendants were reversed

and petition for rehearing overruled. It was held that erroneous instructions were given as to negligence of company in not giving signals at crossing. The Supreme Court held "that the fact that the defendant did not provide a flagman at the crossing, or give other signals to warn the plaintiffs of the movements of the engine, should be considered in determining the question of the defendant's negligence, such signals being required not alone to prevent collisions, but to enable travelers upon the highway to guard against other accidents as well."

In *FUNSTON v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 61 Iowa, 452 (1883), action for damages for injuries to plaintiff, sustained in collision with defendant's train while driving across track, judgment for plaintiff for \$8,000 was affirmed. It was held that "evidence which tended to show that the highway was not as wide, or in as good and passable condition, at the time of the accident as it was before, was admissible for the purpose of aiding in measuring the vigilance to which the defendant and its employees were to be held in the use of signals and the operation of trains in their approach to and passage over the crossing." *Held*, also, that "whether a failure to give any signal when a train is approaching a highway crossing constitutes negligence, depends upon circumstances. But if defendant, in constructing its road, left obstructions on its right of way, which wholly or nearly prevented travelers on the highway from seeing approaching trains, then it was negligence not to give the signals."

Whether a failure to give any signal when a train is approaching a crossing constitutes negligence, depends upon the circumstances. Such failure may or may not constitute negligence. See *FUNSTON v. CHICAGO, R. I. & PAC. R'Y CO.*, 61 Iowa, 452; *ARTZ v. CHICAGO R. I. & P. R'Y CO.*, 34 Iowa, 153; *JACKSON v. CHICAGO & N. W. R. R. Co.*, 36 Iowa, 451; *SPENCER v. ILL. CENT. R. R. Co.*, 29 Iowa, 55 (holding no statutory requirement to give signals).

See *REED v. CHICAGO, ST. P., M. & O. R'Y Co.*, 74 Iowa, 188, where it was held that "under ch. 104, Laws of 1884, to run a locomotive across a public highway without ringing the bell is negligence, for which the railroad company is liable."

In *HARPER v. BARNARD* (Rec'r), 99 Iowa, 159 (1896), it was held that a traveler on a highway has a right to assume that the signals for highway crossing, required by McClain's Code, § 2003, will be given. That section requires that at such a crossing the "whistle shall be twice sharply sounded at least sixty rods before the highway crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed."

COLLISION AT CROSSING — CONTRIBUTORY NEGLIGENCE. — In **SCHAEFERT v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 62 Iowa, 624 (1883), collision at crossing, plaintiff's minor son who was driving team being killed, judgment for plaintiff was reversed on the ground of contributory negligence of the injured party. It was held that "where a person traveling on a highway, and approaching a known crossing of a railway track, with knowledge that the view of an approaching train is to an extent obstructed, heedlessly permits his team to trot over the highway, and makes no effort to look or listen for an approaching train for a distance of eighteen rods from the track, he is guilty of such contributory negligence as will prevent him from recovering, if a collision occurs, provided there are no circumstances which are calculated to distract his attention."

STOP, LOOK AND LISTEN. — In **REED v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.**, 74 Iowa, 188 (1887), collision between train and wagon at street crossing of railroad track, judgment for plaintiff for \$8,250 was affirmed. The syllabus by the official reporter states the case as follows: "Plaintiff was struck by a locomotive and injured, while driving across a railway track on a public highway. Upon the question whether the bell of the locomotive was rung or not, plaintiff testified positively that it was not; that he looked and listened while approaching the track, and that the habits of his horses were such that they would not have gone upon the track had the bell been rung. Other witnesses who were in the vicinity, and some of whom heard the crash of the collision, and one of whom had his attention directed to plaintiff's danger, testified that they did not hear it. But the engineer and fireman, and another employee of defendant who was on the train, testified positively that it was rung. *Held*, that there was such a conflict of the evidence as to preclude this court from interfering with the finding of the jury that the bell was not rung." *Held*, also, that "it is not necessarily the duty of a traveler about to cross a railway track upon a highway to stop his team. He is only required to exercise such care and caution as a reasonable person of ordinary prudence and skill would exercise under the same or similar circumstances."

In **HARPER v. BARNARD**, (RECEIVER OF OMAHA & ST. LOUIS R'Y Co.), 99 Iowa, 159 (1896), collision between vehicle and train at public crossing, judgment for plaintiff for \$1,750 was affirmed. The syllabus by the official reporter states the case as follows: "In an action for injuries received at a railroad crossing, where the negli-

gence charged was the failure of the defendant to give the signals required by McClain's Code § 2003, and which the jury, by their verdict in plaintiff's favor, must have found were not given, there was evidence that the morning was dark and stormy, and that along the highway there was a growth of shrubbery, covered with snow, which obstructed the view of plaintiff, who was approaching the track in a buggy; that he stopped twice before reaching the crossing, and looked and listened for trains, the last stop being made within thirty feet of the track, and that when within ten feet thereof he glanced up and down the track. *Held*, sufficient to warrant a finding that plaintiff was not guilty of contributory negligence."

RUN OVER ON TRACK — COMPARATIVE AND CONTRIBUTORY NEGLIGENCE — INSTRUCTION.—In *O'KEEFE, ADM'X, v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO*, 32 Iowa, 467 (1871), action to recover damages for death of plaintiff's husband, alleged to have been killed by being run over on defendant's road, judgment for plaintiff for \$1,000 was reversed for erroneous instruction on comparative negligence, it being held that the doctrine of comparative negligence does not prevail in Iowa, but that of contributory negligence, and under the latter rule a person cannot recover for an injury to which his own negligence contributed, notwithstanding negligence of defendant.

In *MCALLISTER v. BURLINGTON & NORTHWESTERN R'Y CO.*, 64 Iowa, 395 (1884), person run over by one of defendant's trains, judgment for plaintiff was reversed on the ground of contributory negligence. It was held that "where an adult person, in full possession of mind and senses, for his own convenience, walks upon a railroad track, away from a crossing, while not technically a trespasser, he is in a place where he has not been invited, and is guilty of negligence, and he has no right to demand that persons operating trains shall be on the lookout for him to save him from injury; but if an engineer should discover him there, in danger of being run over by the train, it would be his duty to use reasonable care in trying to avoid the injury." (*Citing MORRIS v. C. B. & Q. R'y Co.*, 45 Iowa, 29).

KILLED WHILE CROSSING TRACK — CONTRIBUTORY NEGLIGENCE. — In *TIERNEY, ADM'X, v. CHICAGO & NORTHWESTERN R'Y CO.*, 84 Iowa, 641 (1892), person killed while crossing track, judgment for plaintiff for \$1,999.99 was reversed on the ground of contributory negligence of injured party. The syllabus by the official reporter, which sufficiently states the facts and points

decided, is as follows: "In an action to recover damages for causing the death of the plaintiff's intestate through the alleged negligence of the defendant, it appeared from the plaintiff's evidence that the plaintiff's intestate, while crossing one of the defendant's tracks in the town of C., known as the "new house track," was run over by a flat car and box car moving of their own momentum upon that track; that the deceased was familiar with the crossing, knew that no flagman was kept there, and knew that cars were liable to be moved upon that track at any time; that the evening was cloudy, and there were engines fired up and emitting smoke in the vicinity, so that the view of approaching cars would be partially obscured, and that the deceased, though somewhat deaf, approached the track in question looking downward. *Held*, that the court should have directed a verdict for the defendant because of the contributory negligence of the deceased."

Collision and crossing accidents — Notes of Iowa cases.

PAYNE *v.* CHICAGO, ROCK ISLAND & PAC. R'Y CO., 44 Iowa, 236 (1876), accident at crossing, train colliding with wagon; judgment for plaintiff reversed for erroneous instruction as to liability of railroad company for failure to erect signboard at crossing. See also former decision in 39 Iowa, 523, and subsequent decision (reversing judgment for plaintiff), in 47 Iowa, 605. See also DODGE *v.* B. C. R. & M. R. R. Co., 34 Iowa, 276.

MORRIS *v.* CHICAGO, B. & Q. R. R. Co., 45 Iowa, 29 (1876), person shipping cattle injured in defendant's stock yard by engine backing against car without warning; judgment for plaintiff for \$3,000 affirmed.

SCHMIDT *v.* BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO., 75 Iowa, 606 (1888), plaintiff's intestate killed while driving across track; judgment for plaintiff affirmed.

ANNAKER *v.* CHICAGO, ROCK ISLAND & PAC. R'Y CO., 81 Iowa, 267 (1890), collision between train and wagon at street crossing; judgment for plaintiff for \$2,175 affirmed.

NIXON *v.* CHICAGO, ROCK ISLAND & PACIFIC R'Y CO., 84 Iowa, 331 (1892), collision with train at crossing; contributory negligence; judgment for defendant affirmed.

REIFSYNDER *v.* CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 90 Iowa, 76 (1894), accident to team in railroad yard; horse frightened by train running across track and killed; railroad company liable; judgment for plaintiff affirmed.

BURG *v.* CHICAGO, R. I. & PAC. R'Y CO., 90 Iowa, 106 (1894), child trespassing on track, killed by train; railroad not liable; judgment for defendant affirmed.

GOODRICH v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'y Co., 97 Iowa, 521 (1896), action for damages for injuries to plaintiff's minor son who, while crossing defendant's track in switch yard, caught his foot in rail and before he could extricate himself was run over by defendant's train; judgment for plaintiff for \$1,766.66 reversed for erroneous instruction on the question of damages for loss of service.

PRATT v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co., 98 Iowa, 563 (1896), plaintiff's intestate while driving across track killed by defendant's train; judgment for defendant reversed for erroneous ruling on contributory negligence as matter of law.

EDDY v. CEDAR RAPIDS & MARION CITY R'y Co., 98 Iowa, 626 (1896), judgment for plaintiff reversed in action for injuries sustained by being struck by electric car while plaintiff engaged in repairing crossing; contributory negligence.

McDIVITT v. DES MOINES ST. R'y Co., 99 Iowa, 141 (1896), collision between street car and vehicle; order for new trial granted after verdict returned for defendant affirmed, the question of negligence of defendant being for jury.

Passengers injured in collisions.

For Iowa cases relating to Passengers injured in Collisions, see notes of the following, reported in 9 AM. NEG. CAS. 332-334; **TUTTLE v. CHICAGO, R. I. & P. R'y Co.**, 48 Iowa, 236; s. c., 42 Iowa, 518; **KELLOW v. CENTRAL IOWA R'y Co.**, 68 Iowa, 470; **QUACKENBUSH v. CHICAGO & N. W. R'y Co.**, 73 Iowa, 458; **BLAKE v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'y Co.**, 78 Iowa, 57; s. c., 89 Iowa, 8.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY v. MORGAN.

Supreme Court, Kansas, January Term, 1890.

[Reported in 43 Kan. 1.]

COLLISION AT CROSSING — DRIVING ACROSS TRACK — BACKING ENGINE — FAILING TO SIGNAL — SPECIAL FINDINGS. — 1. If a person with a team and wagon crossing a railroad upon the highway of a village is injured by an engine, running rapidly backward at the rate of thirty miles an hour without any whistle being sounded, bell rung, or any other signal given, and such person has timely looked both ways, up and down the track, to ascertain whether there is any danger in crossing, and fails to discover the engine approaching, and there are complicated circumstances, as falling snow, a gale of wind, and other things calculated to deceive or

throw him off his guard, the question whether he is guilty of negligence in attempting to cross the track, under the particular circumstances of the case, is for the jury to determine.

2. When the special findings of fact are inconsistent with the general verdict, the former control.

(Syllabus by the court.)

ERROR from Harvey District Court. The facts appear in the opinion. *Judgment modified.*

“On March 3, 1886, John W. Morgan brought his action against the Atchison, Topeka & Santa Fe Railroad Company to recover \$8,000 for damages, alleged to have been received on the 7th day of December, 1885, by him, on account of the negligence of the company. On March 26, 1886, the railroad company filed its answer, which was a general denial of the allegations of the petition. Trial had at the September term of the District Court for 1887, before the court with a jury. The jury returned a verdict for plaintiff, and assessed his damages at \$4,227. On September 26, 1887, the railroad company filed its motion for a new trial, containing all the statutory grounds. This motion was overruled, and judgment rendered in favor of Morgan and against the company, upon the verdict of the jury. The company excepted, and brings the case here.”

GEO. R. PECK, A. A. HURD and C. N. STERRY, for plaintiff in error.

J. W. ADY, for defendant in error.

Horton, Ch. J.—This was an action brought by John W. Morgan against the railroad company to recover for personal injuries; also, for the killing of a pair of horses owned by him, and for damages to his wagon and harness. The material facts in the case are as follows: On the 7th day of December, 1885, about noon, Morgan, while attempting to cross the track of the railroad company at a public crossing with his team and farm wagon on Main street, in the village of Walton, a small place of 250 inhabitants, in Harvey county, in this State, was struck by the rear end of the tender of a railroad engine, running backward through the village and over the crossing at a high rate of speed—thirty miles an hour; his wagon was making some noise. He was severely injured, his horses were killed, and his wagon and harness broken. He was thirty-seven years of age, a farmer by occupation, and had been familiar with the road and crossing for nearly four years. He attempted to cross the railroad track

to reach a coal yard to obtain a load of coal. He approached the crossing from the west and north. The depot at Walton, a small, low building, was 600 feet west of the crossing. A few feet from the crossing, in the direction from which the engine came, two sidetracks gradually diverged from the main track for some little distance, and then paralleled it. Along the south side of the track there were two or three buildings, the depot being between the main track and the side track, running south of it. At the time Morgan attempted to cross the track it was snowing very hard, and the wind was blowing a gale. When he approached the crossing he looked both ways several times, up and down the track, and did not see any engine or cars. When he was within forty or fifty feet of the crossing there were no obstructions immediately upon the track, or on the north side of the track, to a view of the track for several hundred feet west, if the day had been clear.

It may be assumed from the evidence and findings of the jury that the whistle of the engine was not sounded, nor the bell rung, nor any other signal given by the employees operating the engine as it approached the crossing where the injuries occurred which are complained of. In many things the testimony of the witnesses is conflicting, but it was the province of the jury to determine the question of veracity between the witnesses, and, therefore, all matters supported by the testimony found in favor of the plaintiff by the verdict or special findings must be considered as having been proved. The negligence of the railroad company must be regarded under the testimony as having been established.

The most important question presented in the case is, whether Morgan is to be denied any damages for his injuries on account of his alleged contributory negligence. In other words, was it error for the District Court to submit the question of his contributory negligence to the jury? Within the decisions of this court, we do not think we can say as a matter of law that contributory negligence was so clearly established upon the part of the defendant that he cannot recover; and therefore it was not error to refuse to withdraw from the jury the question of his contributory negligence. (*L. L. & G. R. Co. v. Rice*, 10 Kan. 426; *K. P. R'y Co. v. Richardson*, 25 Kan. 391; *W. & W. R. Co. v. Davis*, 37 Kan. 743).

U. P. R'y Co. v. Adams, 33 Kan. 427, and *A. T. & S. F. R.*

Co. *v.* Townsend, 39 Kan. 115, are cited against the recovery of any damages. These cases do not apply. In the former, the parties, who were familiar with the highway and crossing, drove up in a two-horse wagon upon a trot in plain view of the railroad track, without stopping to listen or look for the approach of a train, or take any precaution whatsoever to learn whether there was danger in attempting to cross. In the latter case, the injured party did not look for the train after he reached the right-of-way of the railroad company, and the jury found that he ceased to look at the distance of seventy-five feet before he reached the track. In this case the testimony shows that when Morgan approached the crossing he looked both ways, up and down the track, and the jury found that from the time he reached a point seventy-five feet north of the crossing to the time the engine struck his team, he looked west three times for the purpose of ascertaining whether any engine or train was approaching. It is possible that Morgan was deceived by the appearances on account of the snow and wind. This was more likely to occur as the engine was moving backward, not forward, and not ringing any bell or sounding any whistle, or giving any other signal. An engine and tender running swiftly would not make the noise or rumbling of a train of cars.

The counsel for the railroad company contend that the testimony that Morgan looked and saw nothing, should not be considered, because they say his statement raises no conflict of evidence. Several cases are cited to support this contention. One of these, Artz *v.* Railroad Co., 34 Iowa, 153, is a case where the injured party testified that "he both looked and listened to see the train, but did not." The testimony in that case clearly establishes that the train was approaching him in the night with the engine's headlight burning brightly, and if he looked he must have seen it, or he must have looked very negligently or carelessly. In another case, Railroad Co. *v.* Elliott, 28 Ohio St. 340, it was shown that if the party injured had looked, as a man exercising ordinary care should have looked, he could not have failed to see the train approaching. The other cases referred to are similar, and decide that when the object a person seeks to discover is plainly and palpably visible before him, his evidence that he looked and did not see amounts to nothing; then his testimony is not true, or his exercise of vision is such as to have been negligent or culpable. This, in our view, is not such a case.

In this connection it should be noticed that there were three persons upon the engine, which was running so rapidly — the engineer, the fireman, and a watchman. None of these noticed Morgan or his team until the collision, except the engineer, and he first saw Morgan when the engine was seventy-five or a hundred feet only from the crossing. If Morgan could have seen the engine approaching for a long distance, as counsel for the railroad contend, then of course the persons operating the engines could as easily have seen him, or his team, the same distance. What was said in *Artz v. Railroad Co.*, *supra*, may well be repeated here: "If the view of the railroad as the crossing is approached upon the highway, is obstructed by any means, so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then, whether it was negligence on the part of the plaintiff or the person injured, under the particular circumstances of the case, is a question of fact for the jury."

Again it is contended that the snow storm and gale of wind were temporary obstructions only; therefore, that it was the duty of Morgan, when he reached the track, to wait until these obstructions passed away. We cannot say upon the testimony, as a matter of law, that these obstructions were temporary only; these are matters for the jury, and they were properly instructed to consider them. (*Solen v. V. & T. R'y. Co.*, 13 Nev. 106; *Shaber v. St. P., M. & M. R'y Co.*, 28 Minn. 103; *Salter v. U. & B. R. R'y Co.*, 59 N. Y. 631).

In *McCrary v. Railroad Co.*, 31 Fed. Rep. 531, the temporary obstruction of vision was smoke — something that would pass away in a moment. In *Chic., R. I. & P. R. R. Co. v. Houston*, 95 U. S. 697, 7 Am. Neg. Cas. 345, about all that was decided was: "That upon attempting to cross a railroad track, a person is bound to use his senses — to listen and to look — in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain."

Further, it is said as the jury found that if Morgan had stopped his team twenty feet north of the crossing to look and listen for

the approach of a train, he could have seen the engine in time to avoid the accident, and as he did not stop, therefore, that he is not entitled to any damages. It was said by this court as long ago as 1872, that "the traveler on the highway is not bound to stop when he approaches a railroad." (Railroad Co. *v.* Rice, 10 Kan. 426).

Most of the States support the rule recognized by this court. (2 Lacey, Railroad Dec. 764). Only a few of the States decide that the failure to stop before crossing a railroad track is negligence *per se*. (Railroad Co. *v.* Beale, 73 Pa. St. 504, 6 Am. Rep. 158, 2 Lacey, Railroad Dec. 765).

The plaintiff is not precluded from recovery because on approaching the railroad crossing he did not stop. Of course he must have exercised that degree of diligence in ascertaining the approach of the engine that a man of ordinary prudence would have exercised under like circumstances. If he did this, notwithstanding the special findings of the jury, he is entitled to his damages, if the railroad company, through its agents or employees, was guilty of culpable negligence.

Considering what has already been said, we do not think it necessary to comment at length upon the instructions given or refused. The law was not stated incorrectly, nor any instruction material to the issues refused. It was said in the opinion in Improvement Co. *v.* Stead, 95 U. S. 165: "The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel, on the ordinary highway as the railroad companies have to run trains on the railroad."

These remarks have special application in this case, because the engine had three employees to operate it, and to look out for obstructions. Further, the engine was not drawing any freight or passenger cars, and the parties operating it were relieved from all responsibility in looking after freight or passengers.

The complaint that the special findings of the jury conflict with the general verdict is a substantial one. The verdict was for \$4,227. Morgan testified that at the time of the collision he was farming seventy-five acres of land; that he was confined to his bed after that about three weeks; that it was nearly six months

before he could go to work again; that before he was injured he ordinarily made \$500 a year. He also testified:

“Q. You may state as near as you can, how much less work you can now do, if any, than you could before you were hurt?
A. One-quarter less.

“Q. What do you mean—that you can do three-fourths as much work now as you could before? A. Yes, sir.”

The jury answered to particular questions submitted to them, that Morgan was able to earn \$500 a year prior to his injury; that except the first six months after his injury he was able to do at least three-fourths as much work as he could do before the injury; that in the general verdict there was an allowance of \$25 for the physician attending him, but that there was nothing given for pain or suffering. When the special findings of fact are inconsistent with the general verdict, the former control the latter. (Civil Code, § 287; *Railway Co. v. Lyon*, 24 Kan. 748). As the general verdict did not include any compensation, or damages for pain and suffering, it is excessive—not being supported by the testimony. Why the jury refused to allow Morgan anything for the pain and suffering resulting from his injuries we do not understand. However, the special findings control. The value of the horses killed was \$400; the damages to the wagon and harness were \$40; the physician's bill was \$25; total amount \$465. Morgan's yearly loss, excepting the first six months after his injury, was one-fourth of \$500—\$125. For the first six months of his disability he is entitled to one-half of \$500—\$250. \$2,084 would produce annually at six per cent. interest, (the present legal rates), \$125; therefore, all damages included in the general verdict above \$2,799 cannot be sustained.

The judgment must be reversed unless Morgan, within thirty days, remits \$1,428. If this is done, the judgment will be affirmed for \$2,799, the plaintiff below paying the costs.

The *U. P. R'y Co. v. Dunden*, 37 Kan. 1-8, referred to, furnishes no support to the general verdict. In that case there were no special findings of the jury conflicting with the verdict, or stating what specific damages were allowed or disallowed.

The case will be remanded, and, if \$1,428 is remitted, judgment will be entered accordingly; otherwise a reversal must be had.

All the justices concurring.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. WILLIAMS, ADM'X.

Supreme Court, Kansas, January Term, 1896.

[Reported in 56 Kan. 333.]

COLLISION AT CROSSING — DUTY OF TRAVELER — STOP, LOOK AND LISTEN — INSTRUCTION — OBSTRUCTED VIEW — DUTY OF RAILROAD COMPANY. — 1. Where the view of a traveler on a highway approaching a railroad crossing is so obstructed that he cannot see an approaching train until within a few feet of the track, greater care should be exercised by him than if no such obstruction existed; and in such a case he should make a vigilant use of his senses to determine whether there is a present danger in crossing; and the question of whether he should also stop, before attempting to cross is a matter for the determination of the jury. An instruction, under those circumstances, that he is not bound to stop when he approaches a railroad, is error.

2. A railroad company should not allow any unnecessary obstructions upon its right of way near a public crossing which would obstruct the view of an approaching traveler nor of those in charge of an approaching train. In the conduct of the business of the company, however, it is necessary to place buildings and other structures and things upon the right of way, and, therefore, the trial court cannot arbitrarily instruct the jury that it is the duty of the company to keep its right of way at the public crossing open and free from any obstruction which would obscure the vision of a traveler, and prevent him from seeing an approaching train. Whether or not a duty rests upon the railroad company to keep its right of way free from such an obstruction is a question for the determination of the jury (1).

(Syllabus by the Court.)

“ACTION by Hester A. Williams, administratrix of John S. Williams, deceased, against The Chicago, Rock Island & Pacific Railway Company to recover damages alleged to have resulted from his death by the wrongful act of said company. Defendant brings here for review the judgment rendered for plaintiff.” The facts appear in the opinion. *Judgment reversed.*

1. Collision at crossing — Obstructed view — Instructions. — In *ATCHISON, TOPEKA & SANTA FE R. R. CO. ET AL. v. BELL*, 52 Kan. 134 (1893), action to recover value of two horses killed in collision with train at crossing, judgment for plaintiff for \$169.25 was reversed for erroneous instruction. The syllabus by the court states the point as follows: “The court instructed the jury that it is culpable negligence for the railroad company to permit a tall hedge to grow upon its right of way so as to materially obstruct the view of the track and approaching trains in the vicinity of road crossings. The evidence shows that there was no hedge growing on the right of way. Under the facts *held* substantial error.”

M. A. LOW and W. F. EVANS, for plaintiff in error.

F. W. RAYMOND and GRANT W. HARRINGTON, for defendant in error.

Johnston, J.—As John S. Williams was driving along a highway and over a public crossing of the railway, he was struck by an engine of an approaching freight train of the plaintiff in error, and killed. At the point of collision the railway extended east and west and across the public highway on which the deceased was traveling, at right angles. At the time of the collision a hedge fence extended from some distance north of the railway along the west side of the highway and within from fifteen to twenty-six feet of the railway track. West of this hedge was a large, dense orchard, covering several acres, which extended down to and upon the right of way of the railway. The hedge was thick with foliage, and ten feet high, and this, with the orchard, rendered it difficult for a person driving on the highway to see a train approaching from the west until he had passed the point to which the hedge and orchard extended. At the time of the accident Williams was driving in a wagon, and driving south on the highway, while the train with which he collided was coming from the west; and it appears that he was not seen by those in charge of the engine until they were within from 100 to 150 feet of the crossing. This action was brought by the administratrix of the estate of the deceased to recover damages alleged to have resulted from his death, and the jury awarded a verdict for the plaintiff below for \$4,000.

The principal questions presented for our consideration arise upon the rulings of the court in charging the jury. In one of the instructions the jury was told that "the traveler on the highway is not bound to stop when he approaches a railroad, but is bound to use his senses of sight and hearing, and must exercise that degree of diligence in ascertaining the approach of the engine that a man of ordinary prudence would have exercised under like circumstances." This ruling cannot be sustained. In effect, the jury were told that, dangerous as the crossing was, the deceased was not required to stop before attempting to cross. It appears that the view of the traveler was greatly obstructed at the crossing in question, and that it was an especially dangerous one to a person approaching from the north; and it further appears that the deceased was familiar with the conditions surrounding this crossing. How, then, can the court say, as a matter of law, that

the traveler was not required to stop? The degree of care to be used by a traveler approaching a crossing depends upon its location and surroundings. If, by reason of obstructions or other causes, it is difficult to see or hear the approach of a train, greater care should be exercised than if no such difficulties existed. It was ruled in *A., T. & S. F. R. Co. v. Hague*, 54 Kan. 284, that: "Ordinarily, it is not the duty of a traveler, on approaching a railroad track, to stop; but there are cases where, by reason of obstructions or noises in the vicinity, he would be required not only to look and listen, but to stop and listen, before crossing the track. Whether the surroundings of the crossing and the existing circumstances and conditions are such as to require him to stop is, ordinarily, a matter for the determination of the jury." The Supreme Court of Wisconsin announced the rule as follows: "If the view of a traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows a train is due at such crossing at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force or direction of the wind or of noises in the vicinity, whether made by his own wagon or by other causes, ordinary care requires him to stop his team while he may do so, and listen for the train." (*Seefeld v. Railway Co.*, 70 Wis. 216). In *Patterson on Railway Accident Law* (section 177) the rule as to the degree of care which a traveler should use at a crossing is stated as follows: "Where the view of the line from the highway is obstructed, or the crossing is in other respects specially dangerous, it is the duty of the traveler to exercise a higher degree of care; and if he cannot, by looking and listening, satisfy himself that it is prudent to cross the line, he must stop, or he must adopt such other precautions as ought to be taken under the particular circumstances of the case." See, also, *Railway Co. v. Stommel*, (Ind. Sup.) 25 N. E. Rep. 863; *C., R. I. & P. R'y Co. v. Crisman*, 19 Colo. 30, 11 Am. Neg. Cas. 239, *ante*. In view of the conditions surrounding this crossing, it was error for the court to declare as a matter of law that the traveler was not required to stop. Under the circumstances of the case, it was a proper matter for the consideration of the jury.

The court also trespassed upon the province of the jury in declaring that it was the duty of the railway company to keep its right of way at the crossing in question free from obstructions,

and open to the vision of travelers on a public, traveled road. The duties of the company and the traveler at a public crossing are to some extent reciprocal. Both must take such precautions to avoid accidents as the circumstances of the case require. The railroad company should not allow any unnecessary obstructions upon its right of way near a public crossing which would obstruct the view of an approaching traveler nor of those in charge of the approaching engine and train. If it unnecessarily and negligently permits brush, trees or other obstructions to grow or stand upon its right of way near a public crossing, it must be held responsible for injuries resulting to others from such negligence, providing such others are free from fault. In the conduct of the business of the company, however, it is necessary to place buildings and other structures and things upon the right of way, and, therefore, it can not be arbitrarily said by the trial court that it is the duty of the company to keep its right of way at the crossing in question open and free from any obstruction which would obscure the vision of a traveler and prevent him from seeing an approaching train. Whether it is necessary or negligent to place an obstruction upon the right of way is another matter to be left with the jury.

For these reasons the judgment cannot be allowed to stand. It is insisted by the company that it is entitled to judgment upon the findings and evidence, but a reading of the same satisfies us that we would not be warranted in directing a judgment in its favor.

The judgment of the District Court will be reversed, and the cause remanded for a new trial. All the justices concurring.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY v. SHAW.

Supreme Court, Kansas, January Term, 1896.

[Reported in 56 Kan. 519.]

COLLISION AT STREET CROSSING — DRIVING ACROSS TRACK — GATES — CONTRIBUTORY NEGLIGENCE. — 1. In an action against a railroad company to recover damages for injuries received by the plaintiff at a street crossing in a populous city, where the only negligence charged is in the management of the engine and cars by the employees of the company, it is not proper to admit testimony showing that the company was required by a city ordinance to maintain automatic gates at the crossing.

and that it failed to do so, nor for the court to instruct the jury that such failure would be negligence on the part of the company; but where it is clear, from the uncontradicted testimony in the case, that the injury was caused by the gross negligence of the employees in the management of the engine and cars, and that the testimony with reference to the absence of gates did not influence the jury, the verdict and judgment will not be set aside because of the failure of the plaintiff to allege in her petition the failure to maintain gates as a ground of negligence.

2. Where a street in a city is crossed by numerous railroad tracks, it cannot be declared, as a matter of law, that the plaintiff was guilty of contributory negligence, in driving across the tracks on a slow trot, when the testimony shows that no engine was in sight, and that there was nothing else apparent indicating danger, and where it is shown that the plaintiff was vigilant in the use of her senses in endeavoring to detect danger. In such a case the question of contributory negligence should be left to the determination of the jury.
3. The trial court is not bound to compel direct answers to all questions that a party may propound to the jury. It is only fair and pertinent questions that can be truthfully answered under the testimony that a party may insist upon having answered as a matter of right.
(Syllabus by the Court.)

ERROR from Sedgwick District Court. *Judgment affirmed.*

“This action was brought by Alice Shaw to recover damages for injuries received while crossing a railroad track in the city of Wichita. The plaintiff and Mrs. Frazer, with her baby, were in a spring wagon, passing along First street. Near the intersection of First street and Fifth avenue, First street crosses a number of railroad tracks. The west one, where the plaintiff was injured, is called the “Hawn track.” About fifty-three feet east from this is what is termed the “Wichita & Western track,” and about fifteen feet from that is the main track. There were many cars standing on the various tracks at the time, the Wichita & Western track being nearly filled with cars. On the Hawn track there were about fifteen freight cars. There was an engine in the vicinity of Second street, which is the next street north from First street, and distant about 600 feet from it, engaged in switching cars onto the Hawn track. The train crew consisted of an engineer, fireman, foreman and two others. The testimony all shows that the engineer and fireman were on the engine; that a man named Lee was stationed near the switch-stand connecting the Hawn track with the Wichita & Western. As to the location of the other two men at the time the plaintiff was hurt the evidence is somewhat conflicting, but it appears that McCambridge, the foreman, was down near First street, and that he

went between the cars to which the engine was attached and other cars which were standing near First street to make a coupling. The foreman testified that he himself stood within thirty feet of First street, and that the other man, whose name he did not remember, but whom he calls "Flatty," was located in the center, between himself and Lee. It seems clear from all the evidence that the name of the man he calls "Flatty" was Ingram, and, according to his testimony, he was then just south of the place where the accident occurred, about to make a coupling between the car that struck the plaintiff and another car south of First street. From the testimony of the plaintiff and Mrs. Frazer, it appears that, as they approached the track, the speed of the horse was slackened; that they both looked up and down the tracks to see if there were any engine or cars approaching; that they saw many cars on the various tracks, but did not see any engine. They passed along the street across all the tracks but the last one on a slow trot. As the horse was about to step on the Hawn track, they noticed that a car which had been standing partly in the street began to move. It appears that about this time a person standing on the sidewalk on the north side of the street called to them, and there is some testimony that Ingram, McCambridge and Ruggles, a car sealer, also called to them before they came to the track, but they did not hear any of the warnings. They urged the horse forward, deeming it the safer course to pursue. The hind wheels of the buggy were struck by the car, and the plaintiff was thrown forward to the ground near the horse's feet and hurt. The testimony of the engineer shows that he received no signal at the time the buggy was struck, nor until he stopped; that he stopped "for the reason that he felt the cars strike against something. I backed up until I felt the cars strike, and then stopped." Other testimony shows that a bolt on the corner of a car caught the felloe of the hind wheel of the buggy, holding it fast, and that it was shoved back by the moving car until it struck the platform of the Zephyr mill, which was located west of the track, on the south side of First street. The cars moved on some distance past the north end of the mill platform. The jury rendered a general verdict in favor of the plaintiff for \$5,000, and by their special verdict they stated that \$1,000 of this amount was allowed as exemplary damages. Motions were made for judgment in favor of the defendant on the special findings of the jury, and

for a new trial. The motion for judgment was overruled, and on the hearing of the motion for a new trial the plaintiff remitted the \$1,000 allowed as exemplary damages, and thereupon that motion also was overruled, and a judgment entered on the verdict for \$4,000. The defendant brings the case to this court."

A. A. HURD and F. W. BENTLEY, for plaintiff in error.

SMITH & DOUGLASS and HOLMES & HAYMAKER, for defendant in error.

Allen, J. — (After stating the facts). The errors assigned are very numerous. We have examined them all, but deem it unnecessary to make mention of any but the principal questions presented.

1. It is said that the negligence charged was that "the engineer and servants in charge of said train, suddenly, carelessly, and with gross negligence, backed said train across said highway, striking the wagon in which said plaintiff was riding." On the trial, the plaintiff offered in evidence an ordinance of the city of Wichita requiring the defendant to maintain and operate automatic gates at all street crossings, where there were two or more tracks. This was objected to by the defendant, but the objection was overruled. The plaintiff proved, without objection, that no gates were maintained, and that no flagman was stationed at the crossing, and the court instructed the jury that if they found that an ordinance required the defendant to maintain gates across First street, that the defendant failed to comply with the ordinance, and that such failure was the proximate cause of the injury, the defendant would be liable for the damages resulting from it. The jury, in answer to the forty-fifth question, find that it was negligence on the part of the company not to maintain automatic gates at this crossing. The failure to maintain gates at a crossing where the city ordinance required them might be, of itself, such negligence as would render the company liable for an injury received by a person crossing the track, and, where the failure to maintain the gates is relied on as the ground of recovery, it ought to be alleged in the petition. A careful examination of the whole case presented convinces us, however, that the jury were not influenced by this testimony. The failure to maintain the gates was not relied on for a recovery. There was an abundant showing of negligence without it. The forty-fourth special question submitted by the defendant was: "Q. Do you find that the defendant caused plaintiff's injury by wilful

and wanton negligence? A. Yes." We think the testimony of the witnesses for the defendant, and especially that of the engineer, shows that the switching crew were not only guilty of negligence, but of very gross negligence. The car which struck the wagon was standing, as the jury find, fifteen to eighteen feet south of the north line of First street. The engineer testifies that he could not see the rear cars because of cars on the Wichita & Western track. It is clear from all the evidence that no person was stationed upon or near the car which caused the injury, either to observe and warn persons passing along the street, to regulate the movement of cars, or to give signals to the engineer, nor were there train men so stationed along the train that signals could be readily transmitted to the engineer by any one on the ground near First street. The foreman was operating in utter disregard of the safety of persons passing along the street, and we think the finding of the jury of wanton negligence in the management of the train is not only abundantly sustained by the evidence, but is uncontradicted by any witnesses except McCambridge himself, and even his testimony fails to show that he was taking that care which ought always to be taken under similar circumstances. Under this state of facts, the error with reference to the gates appears unimportant.

2. The claim that the plaintiff was guilty of contributory negligence as a matter of law, merely because the horse passed along the street on a slow trot cannot be sustained. Her conduct, was of course, a proper subject of consideration by the jury, and the question whether she acted with ordinary prudence was fairly submitted to them, and their finding was in her favor. As the car which caused the injury was standing still until the horse was almost upon the track, and as the engine which propelled it was a long distance away, out of sight, and especially as no train man was in sight to give any warning that the car was likely to move suddenly, we are unable to perceive anything in the conduct of the plaintiff sufficient to bar her recovery, and certainly not in opposition to the finding of the jury.

3. At the request of the defendant, fifty-two special questions were submitted to the jury. They were not all answered when the first returned into court, and the jury were again sent out. As the verdict was finally received, the eighth, fifteenth, thirtieth, thirty-first, thirty-second and fiftieth questions were answered, "Don't know." Numerous cases are cited to the effect that

these answers are improper, and that the court should have required the jury to return proper answers to them. It is only pertinent, properly framed questions which can be intelligently answered from the testimony that the court is required to compel an answer to. We do not deem it of any general interest to enter into a minute analysis of these questions, or of the testimony bearing on them, but shall content ourselves with the remark that the answers are fairer than the questions, and about as good as could be given under the testimony. The twenty-eighth question and answer were: "Was there anything to prevent plaintiff from seeing the engine when 110 feet from the main track, if she had looked in its direction? A. We cannot answer, as no direction is given." There is very little significance in this question, and we think the answer is only subject to criticism because of the concluding portion of it. What the jury doubtless meant is that, from the testimony, the exact direction of the engine from the point named, when the plaintiff passed it, could not be determined; and we think this is the truth.

4. It is claimed that the damages are excessive, given under the influence of passion and prejudice, and reference is made to the finding that the defendant was guilty of wanton and wilful negligence and awarded \$1,000 exemplary damages as evidence thereof. There was a great deal of testimony by physicians with reference to the nature of the plaintiff's injuries. That she was severely hurt and rendered delirious several days, is beyond dispute. Whether her injuries are of a permanent character, and such as the testimony in her behalf tended to show, was a proper matter for the consideration of the jury; and we find nothing in the award of damages to shock our sense of right, nor are we at all clear that this was not a proper case for exemplary damages.

5. Many questions were raised on the introduction of testimony, and are urged in the brief, but we find nothing we deem reversible error, nor worthy of special mention. Numerous criticisms of the instructions are made, but, on the whole, we think the case was fairly submitted, and that the verdict was right. The judgment is affirmed. All the justices concurring.

MISSOURI PACIFIC RAILWAY COMPANY V. MOFFATT ET AL.

Supreme Court, Kansas, January Term, 1896.

[Reported in 56 Kan. 667.]

DRIVING ACROSS TRACK — COLLISION AT CROSSING — ISSUES — DUTY OF RAILROAD COMPANY TO GIVE WARNING — STATUTE — SIGNAL — OBSTRUCTED VIEW — EVIDENCE. — 1. In an action against a railway company to recover damages for the killing of a person at a highway crossing, where there is no averment or proof that the speed of the train which struck the deceased was unlawful or negligent, the trial court is not justified in enlarging the issues, and submitting to the jury the question of whether the company was guilty of negligence in running the train at a high rate of speed.

2. It is the duty of a railway company to give reasonable and proper warnings for the protection of travelers on the highway when its train approaches a crossing. The number and kind of signals required depend upon the character of the crossing, the speed of the train, and the surrounding circumstances.
3. The statute which requires a railway company to give certain signals at highway crossings was not intended to furnish a standard by which to determine in every case whether or not such company had fully discharged its duty in respect to giving sufficient warnings to the traveling public of the approach of its train. It was intended, rather, to prescribe the minimum of care which must be observed in all cases. *A. T. & S. F. R. Co. v. Hague*, 54 Kan. 284.
4. Where it is claimed that an intervening bluff along which a railway was built prevented a traveler approaching the crossing from hearing the ordinary signals, it is competent to show, by a witness who has made a test at the place of the injury, and under substantially similar circumstances, how far the signals can be heard, and the effect of the intervening bluff in obscuring the vision, and deadening the sounds made by a passing train.
5. Where there is positive evidence that signals were given, and only negative testimony that they were not given, it is the duty of the court, upon request, to call the attention of the jury to the relative value of the two kinds of evidence. *Mo. Pac. R. Co. v. Pierce*, 39 Kan. 391.

(Syllabus by the Court.)

ERROR from Wyandotte District Court.

Action by Eliza M. Moffatt and others against the Missouri Pacific Railway Company. From judgment for plaintiff, defendant brings the case to this court. The facts appear in the opinion.
Judgment reversed.

B. P. WAGGENER, D. MARTIN and J. W. ORR, for plaintiff in error.

JAMES F. MISTER, J. O. FIFE and HUTCHINGS & KEPLINGER, for defendants in error.

Johnston, J. — On the morning of October 23, 1890, Andrew C. Moffatt was in a wagon driving a team of horses along a highway in Wyandotte county; and, at the intersection of the highway with the Missouri Pacific Railway, he was struck and fatally injured, by the locomotive of a passenger train. It was a regular train, which was about on time, running at the usual rate of speed, and the engineer and fireman in charge were in their proper places. They had sounded the whistle for the crossing at a point eighty rods away, and about the same place the bell was rung; but it does not appear that the whistle was again sounded, and, although those in charge of the train claim that the bell was rung continuously until the crossing was passed, that is a subject of dispute. The crossing is in a rural district, and west of the railroad — the direction from which Moffatt was coming. There is a high hill which obscured the view of the train, and to some extent deadened the noise of its approach, and the sound of any warnings that were given. A dense fog prevailed on that morning, and the engineer did not see Moffatt going upon the track until the train was within fifty feet of the crossing; and while those in charge of the train did everything in their power to stop, and prevent injury to Moffatt, after they discovered him, he was struck, and within a few hours afterwards he died from the resulting injuries. He was a widower, and left six children, whose ages range from fourteen to twenty-two years. This action was brought by the children, who allege that they were living with their father, and were wholly dependent on him for their maintenance and support. The issues upon the trial were whether the railway company was guilty of negligence in failing to give sufficient warnings of the approach of the train to the crossing, and whether the deceased was guilty of contributory negligence. The trial was with a jury, who found against the railway company, and awarded damages in favor of the plaintiffs in the sum of \$8,000.

As Moffatt was a resident of Missouri at the time of his injury and death, the action was properly brought by his children, under section 422a of the Civil Code. The objections made to the validity of that provision of the Code have been held to be unavailing. *Berry v. K. C., Ft. S. & M. R. Co.*, 52 Kan. 759.

An attack was made upon the petition because of the indefiniteness of the averments respecting the negligence of the company. The allegations of the petition are sufficiently specific in

stating that the fault of the company was in approaching the crossing with its engine and cars without giving any warning, and without using the bell or blowing the whistle. It contains some averments of a very general nature, relating to the dangerous character of the crossing, of running the train at a high rate of speed, and of not using some other and different methods than blowing the whistle or ringing the bell for the protection of those who might be upon the crossing. These general averments are insufficient to justify the admission of proof as to any negligence of the company beyond the failure to give proper signals and due warning of the approach of its train. If other acts of negligence are relied on, they should have been distinctly set forth; and, when the court denied the motion to make the averments more definite and certain, no other proof of negligence should have been received, nor should any other grounds of recovery have been submitted to the jury, than those which were properly pleaded. Although there was no averment or proof that the speed of the train was unlawful or negligent, the trial court enlarged the issues, and, by an instruction, submitted to the jury the question of whether the company was guilty of negligence in running the train at a very high rate of speed. The jury responded with a finding that ten miles an hour was a dangerous speed at such place, and that the railroad company was guilty of negligence by reason of running its train at a very high rate of speed while approaching the crossing. It was a passenger train, then running at a speed of from thirty to thirty-two miles an hour, which was the usual speed of that train. The crossing was in an open country, where there was no statutory or municipal regulation with respect to the speed of trains. The demands of the public and the necessities of modern business require that such trains should be run at a rapid rate, and railroad companies would hardly be justified in slackening the speed at every such highway crossing to avoid the risk of a collision with some one who was passing over the same. Even if the rate of speed had been pleaded as a specific act of negligence, it could hardly be held, under the circumstances, that the speed at which the train in question was run was negligent or unlawful. The court, however, without justification made the speed of the train an element of negligence, and the jury evidently made it a basis of recovery. In this there was error.

It was the duty of the railway company to give reasonable and

proper warnings for the protection of travelers on the highway when its train approached the crossing. The number and kind of signals required depended upon the character of the crossing, the speed of the train, and the surrounding circumstances. It is earnestly argued that, the statutory signals having been given, the company had discharged its full duty to the public and to Moffatt. Complaint is, therefore, made of an instruction in which it is stated that "the statute which requires a railroad company to give certain signals at street crossings was not intended to furnish a standard by which to determine in every case whether or not such company had fully discharged its duty to prevent injury to the traveling public. It was intended rather, to prescribe the minimum of care which must be observed in all cases." Under ordinary circumstances, in the open country, the railroad company can run as many trains and at as great a rate of speed as is consistent with the safety of its passengers. In such cases it will ordinarily be sufficient to give the signals that are required by statute. Where, however, the crossing is a dangerous one, and where the road is constructed in such a way and place as to make it more than usually difficult to see the train or to hear the signals that are given, additional signals may be required. In this case it appears that the railroad is constructed between the bluff and the river, and that the bluff intercepts the vision of travelers approaching from the west on the highway. The testimony tends to show that on a foggy morning, like the one when the injury occurred, the bluff so obstructs the transmission of sound that the statutory signals cannot be heard by a traveler approaching the crossing. The legislature did not undertake to prescribe the standard of care required in all cases. It is to be determined, rather, from the situation and circumstances surrounding it. It is the duty of the railroad company, when the statutory signals or warnings are insufficient, to give other and additional warnings, such as reasonable care and prudence would dictate under the circumstances of the particular case; and the question of negligence in such a case is for the jury to decide. The view urged by the company in this case was presented in *A. T. & S. F. R. Co. v. Hague*, 54 Kan. 284. It was there said: "We are unable to adopt the theory that the performance of the statutory requirements is the full measure of the company's duty towards the public at crossings. Circumstances may arise where the giving of other warnings or signals may be necessary and obligatory

upon the company." Instances are there given where it is held that it would be reasonable and right to require additional warnings, so as to avoid injury to persons or property that might be passing over the crossing. We do not determine that additional warnings were necessary in this case, but only that the situation and circumstances were such as to justify the instruction that was given, and the submission of the question to the jury.

In an effort to show that the statutory signals were insufficient at the crossing in question, the testimony of a witness who stood on the highway near the crossing, and listened for the signals and noises of several passing trains, was received over the objection of the company. We think the testimony was competent. It tended to show that, on account of the intervening bluff, a traveler approaching the crossing could not hear the signals given eighty rods away, and was of some value in the determination of the question of whether or not Moffatt could reasonably have heard the approach of the cars under the circumstances existing at the time and place where the casualty occurred. If the test is made at the place and under substantially similar circumstances, it is difficult to see how better proof upon that question can be obtained. The testimony might be weakened to some extent by reason of the different condition of the atmosphere when the test was made, but this would affect its weight rather than its competency. Testimony of a like character was received on behalf of the railway company, and the further testimony which it offered upon the question, and which was excluded, was of little, if any, value.

Although there was no testimony whatever as to the earnings of the deceased, the jury, in answer to a special question, found that his earnings per year were about \$2,000. Findings were also made that previous to his death he had contributed to the support of the children; and, although several of them had reached majority, it is found, without testimony, that they derived their entire support from their father. One witness stated that the family were dependent upon the father for their support; but a further examination developed that he had no knowledge upon the question, and that the statement was a mere opinion, which was not admissible in evidence. The unsupported findings bore directly upon the amount of damages to be awarded, and were, therefore, important.

The court erroneously refused to instruct the jury upon the

relative value of positive and negative testimony. There was positive testimony offered by the company that the bell was rung continuously from the whistling post to the crossing. In opposition to this, there was the negative testimony of persons upon the train that they did not hear the ringing of the bell. In view of the condition of the testimony, the refusal of the court to give the instruction requested is contrary to the decisions of this court. *K. C., Ft. S. & G. R. Co. v. Lane*, 33 Kan. 702; *Chicago, K. & W. R. Co. v. Commissioners of Stafford Co.*, 36 Kan. 121; *S. K. R'y Co. v. Hinsdale*, 38 Kan. 507; *Mo. Pac. R'y Co. v. Pierce*, 39 Kan. 391.

For the errors mentioned, the judgment will be reversed, and the cause remanded for a new trial.

ALLEN, J., concurs. MARTIN, Ch. J., having been of counsel, did not sit.

WEBER ET AL. V. ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.

Supreme Court, Kansas, July Term, 1894.

[Reported in 54 Kan. 389.]

PLEADING AND PRACTICE — AVERMENTS AND ADMISSIONS — ACCIDENT AT CROSSING — CLIMBING OVER CARS STANDING ON STREET — SIGNALS AND WARNINGS. — 1. after the pleadings of the parties had been filed, a trial begun, and each party had made a statement of the case to the jury, an objection was made to the admission of any testimony, upon the ground that the petition, in connection with the statements made in behalf of plaintiffs, failed to show a right of recovery. A colloquy then ensued between the court and counsel for plaintiffs, in which some admissions were made by the latter. The court then sustained the objection, took the case from the jury, and dismissed the action, holding that, under the averments of the petition and the admissions of the parties, no recovery could be had. *Held*, that, under those circumstances, the averments and admissions of the plaintiffs should receive a liberal interpretation in their favor.

2. While the general rule is that those who climb over or under a train of cars which has made a temporary stop, and apparently will soon move on, do it at their peril, yet, in a case where detached cars have been left standing for more than an hour across a public street, one of which is a caboose, and the steps and platform of which are in line with the street, and a person approaching, who has an unobstructed view of that track and sees no locomotive or train thereon, and after using care to discover whether there is danger of the removal of the cars, and finding none, attempts to cross over the platform and steps of the caboose, and is injured, it cannot be held,

as a matter of law, under the circumstances surrounding this case, that such person, in making the attempt, was guilty of contributory negligence.

3. Where detached cars have been left standing for a long time over a public street in common use, it is the duty of those in charge of an approaching train, upon the same track, with a view of connecting or moving such cars, to give due signals and warnings of their approach, so that those upon the street who might be near the standing cars should have an opportunity to get out of danger.

(Syllabus by the Court.)

ERROR from Cowley District Court. *Judgment reversed.*

“ The plaintiffs, who are the next of kin to Myrtle G. Weber, deceased, brought this action to recover the damages suffered by them in the death of Myrtle G. Weber, caused, as they allege, by the wrongful act and neglect of the railroad company. The petition after alleging the corporate character of the defendant, and that it owned and operated a certain railroad, states :

“ That on the 17th day of March, 1889, these plaintiffs were the parents and next of kin of one Myrtle G. Weber, an infant of the age of sixteen years, then residing with said plaintiffs at the city of Winfield, Cowley county, Kansas; that on said day said Myrtle G. Weber was traveling along and upon a certain street known as Fuller street, in the city of Winfield, in the county of Cowley, State of Kansas, which said street is a public highway, and said street and public highway crosses the track of the defendant's railway in said city of Winfield, Kan.; and when said Myrtle G. Weber reached said crossing, the defendant had three cars attached to a caboose standing on its track and across said street and public highway. Said three cars attached to said caboose had so been standing across said street and public highway for more than one hour preceding the injury hereinafter alleged, and in violation of section 1, of ordinance No. 284, of the city of Winfield, Kansas, and other ordinances of said city; and while said Myrtle G. Weber was attempting to cross said track of said defendant at said crossing, the defendant, by its servants, caused one of its locomotives and train of cars to approach said crossing, by backing and passing rapidly over and along the track of the said railroad, and ran said locomotive and cars with carelessness and gross negligence, and striking the said three cars attached to said caboose which were upon the same track, and negligently and carelessly omitted, while so approaching said crossing, to give any signal, by bell, or whistle or lights or otherwise, by reason whereof, the said Myrtle G. Weber was unaware of the

approach of said locomotive and train which was backing, and by reason of said gross negligence of the defendant, and in violation of section 1, ordinance No. 355, of the city of Winfield, Kansas (and without any fault or negligence of the said Myrtle G. Weber), the locomotive and train of cars struck the said Myrtle G. Weber, with great violence, to the ground, and under the wheels of the cars of the defendant, and dragged her, the said Myrtle G. Weber, while so under the wheels of the defendant's cars as aforesaid, for more than fifty feet along and over the track of the defendant, thereby breaking and fracturing the left lower limb, and lacerating, mangling and tearing the flesh from the left lower limb, and otherwise injuring the said Myrtle G. Weber; that by reason of said injuries the said Myrtle G. Weber, on the 20th day of March, 1889, did die; and that no personal representative is or has been appointed of or for said deceased; and that by reason of said injury and death of said Myrtle G. Weber these plaintiffs have been damaged in the sum of \$10,000.

"The answer of the defendant was a general denial. At the trial one of the attorneys for plaintiffs made an opening statement. After reading the petition, he said: 'And in order that you may understand the nature of this case, on the 17th day of March, 1889, Myrtle G. Weber and her mother, in company with a lady by the name of Keith, came down to Fuller street to the crossing, where it crosses the Southern Kansas Railroad, on their way to church that evening. It will appear in evidence that there was a caboose standing across the track, across Fuller street and the sidewalk, that there was no engine attached to either of these three cars or caboose, and while they were attempting to cross the track, an engine, attached to fourteen or fifteen cars, came backing down on the track and struck these three cars and caboose. They were running at a rapid rate of speed, and, just as they were attempting to cross this track, threw this girl under the wheels. These cars had been standing there for a long time, as we allege, in violation of certain ordinances; that after she was thrown under the wheels she remained there or was dragged about fifty feet from the place where she was first thrown under, and remained there perhaps twenty or thirty minutes before she was rescued; that then she was taken out and taken home, and that by reason of the injuries which she received there that night, that upon the 20th day of March, 1889, she died. We expect to show that there was no fault upon the part of the girl or her mother, and

that the railroad company was grossly negligent in backing the train of cars down without any signal — neither the bell, whistle or lights. We expect, further, to show that there was no light upon this caboose. It was dark — after dark — the time it occurred. There was no light on the caboose, nor neither was there a brakeman at the crossing and as the train backed up — the fourteen cars and engine — there was no brakeman there with a lantern or any other signal. That is, in brief, our case.'

"After the defendant stated its case to the jury, a witness was called by plaintiffs, but the defendant objected to the introduction of any evidence, because the petition, in connection with the admissions made by the attorneys for plaintiffs, showed that they were not entitled to recover. The court then took up the petition and examined the same, making some comments, when his attention was called to the case of *Howard v. K. C., Ft. S. & G. R. R. Co.*, 41 Kan. 403." (After discussing that case, a colloquy between the court and counsel for plaintiffs occurred; which is sufficiently referred to in the opinion by the court.)

"A motion for a new trial was made and overruled, and plaintiffs bring up the rulings of the court upon a case made, and ask for a review and reversal."

TORRANCE & TORRANCE, for plaintiffs in error.

A. A. HURD and ROBERT DUNLAP, for defendant in error.

Johnston, J.—It is an unusual practice to dispose of a case upon the petition and meager statements such as were made by counsel for the plaintiffs. It seems that the court was proceeding to determine the sufficiency of the petition upon objection to the admission of any testimony, and was inclined to hold that its averments showed contributory negligence on the part of the deceased, under the rule in the case of *Howard v. K. C., Ft. S. & G. R. R. Co.*, 41 Kan. 403 (1), when a colloquy ensued between court and counsel for plaintiffs as to the inferences that were to be drawn from the allegations of the petition, and at that time some statements or admissions were made by counsel for plaintiffs. The court took the case from the jury, holding that, under the averments of the petition and the admissions just then made, no recovery could be had. Under those circumstances, the averments and claims of the plaintiffs should receive a liberal interpretation in their favor, and looking at them in that view, we think the ruling of the court cannot be sustained.

1. See abstract of the *Howard* case, with the *Kansas* cases, reported in this volume, *post*.

The petition alleges negligence on the part of the company in placing three cars and a caboose across a public street of the city, in violation of an ordinance, where they were allowed to remain for more than an hour before the injury occurred; that while Myrtle G. Weber, an infant of sixteen years, was attempting to cross the tracks at the crossing of the street, the company, in violation of another city ordinance, backed a locomotive and train of cars rapidly down the track, without any lights, signals or warnings of any kind, against the three cars and the caboose standing across the street, with great violence, striking Myrtle and knocking her down, by reason of which, and without any fault or neglect on her part, she was crushed and mangled in such a way that her death resulted from the injuries about three days later. From the admissions made, it appears that the cars standing across the street were not attached to any locomotive, and no one was in charge of them, and although it was night there was no light in the caboose nor on or about any of the cars. When Myrtle and those with her approached the crossing on their way to church they found the street obstructed, and the steps and platform of the caboose, which adjoined one of the freight cars, were in line with the street. Myrtle then started across the steps and platform of the caboose, when she was thrown off and under the wheels, in the manner alleged. Daylight had gone, but how dark the night was does not appear. When she attempted to cross, the locomotive and cars attached to it, which were subsequently backed down against the detached cars, could not be seen, and how far they could have been seen with an unobstructed view on that night is not shown.

The remarks of the court when the decision was made indicate that the rule of the Howard case was deemed to be applicable and controlling in this. There, however, as will be seen, the injury resulted from jumping off a car on which the woman had climbed, and no act of the railroad company was the proximate cause of her injury. It is generally held that those who climb over or under a train, the locomotive of which is steamed up and apparently ready to move, do so at their peril; the same rule applies with respect to those who attempt to cross over the bumpers or couplings between the cars of a freight train in like condition; and this is upon the principle that those who voluntarily assume a position so obviously dangerous cannot complain of injuries received while in such position. The crossing, however,

upon the steps and platform of a caboose or passenger car, detached from the engine or from the train, and when there are no indications of a removal, is hardly parallel with a crossing made over or under a train which has made a temporary stop, and, in the nature of things, will soon be moved. In this instance the detached cars had stood for a long time upon the street, and who could tell when they would be moved, or whether they would be moved at all during the night? So far as shown, there was nothing to indicate that they were soon to be attached to or put into a train. Taking the record as it is, there was no light in or upon them, no one was present who had charge of them, and no train or locomotive was seen approaching to connect with them.

The steps and platform of the caboose were in range with the walk upon the street along which Myrtle was passing, and they were provided as a safe and suitable means for entering and leaving the caboose. They afforded a passage across the train which under some circumstances would be reasonably safe, while under others an attempt to cross thereon would be necessarily perilous. She was entitled to the use of the street, and while the negligence of the company in blockading it may not have been the proximate cause of the injury, it cannot be said that the company was free from negligence in the manner in which it approached and collided with the detached cars which stood over the street. The cars having stood for so long a time over a street in common use, it was the duty of those in charge of the approaching train to give proper signals and warnings of its approach, so that those upon the street who might be near the train should have an opportunity to get out of danger. Instead of giving such signals or warnings, it is stated that the train was rapidly backed down, with no lights or signals of any kind, and no brakeman or guard on the rear of the train, to notify persons upon the crossing of its approach. It is stated that it was run down at a very rapid rate of speed in the manner indicated, in violation of a city ordinance regulating the movement of trains within the limits of the city. It is certain that the allegations are sufficient to charge negligence in the company, and the question is whether, under the averments of the petition and the meager statement of facts brought to the attention of the court, it can be said as a matter of law that the deceased was guilty of contributory negligence in attempting to cross. The general rule is, that when the

question of contributory negligence depends upon the circumstances from which different minds might arrive at different conclusions, the question should be submitted to a jury, under proper instructions.

How can it be said, in the light of the surrounding circumstances, that the danger in attempting to cross the track in the manner in which she did was so obvious that a person of ordinary prudence would not have made the attempt? If an unobstructed view of the track could have been had, and if she stopped and carefully looked and listened for the approach of the train, and none was seen or heard, and then she ventured to pass over the steps and platform, can it be said as a matter of law that she was guilty of contributory negligence? It is said that she was an infant, and how capable and well developed she may have been was not brought out in the running talk which occurred between the court and counsel just before the case was dismissed. In view of the allegation that she was not negligent, and in the absence of any statement to the court to the contrary, we may assume that she did exercise care before attempting to cross, and did stop, look and listen for the approach of a train on the track whereon the detached cars were standing. It is not always held to be negligence to pass around or between detached cars standing upon a street. In every case the question is, whether there is such an obvious danger and such a probability of injury as would deter a reasonably prudent person from assuming the risk of passing through or around such cars. If the risk is great, and such as a prudent person would not assume, then one who assumes the risk is guilty of negligence which will preclude a recovery for any injury suffered. Under the circumstances of this case, how can it be said that there would have been any less risk in going behind or around the caboose than over the steps and platform which were intended for the use of people in entering and leaving such caboose?

Of course, a high degree of care is required of one who attempts to cross over or around cars standing upon a street, and if a person attempts to cross when there is an obvious danger that the train will be moved at any time, he is guilty of negligence. If Myrtle knew or should have known that these cars were part of a train which had been broken in two, and that one part would soon be backed up and united with the other, and if she then ventured to cross the street without looking along the track to

see whether the locomotive and other cars were coming, or if her view was obscured by obstructions or darkness so that she could not see the approach of such a train, and then attempted to cross without taking any care to learn that there was a present danger in crossing, she would be guilty of negligence in making the attempt. The cars, however, as we have seen, were detached, at a standstill, and, so far as we can see, there were no indications to Myrtle that the cars would be moved before she could effect a passage over the platform and steps in safety.

It is true that the position of the cars on the street would ordinarily give rise to the inference that they would be moved, but how soon they would be set in motion was not apparent, and the question is whether, in view of the special circumstances of the case, she exercised reasonable care in attempting to cross. We are unwilling to say that her conduct was contributory negligence *per se*, and while there is doubt of plaintiff's right of recovery, we think, under the circumstances, that it is such a case as should be left to a jury. Submitted as this case was, the averments and statements of the plaintiffs should be given the most favorable consideration they will reasonably bear. Taking them in that way, we think the dismissal of the case was error.

Some question is raised as to whether all the admissions are contained in the record, but, as recited there, it is evident that all upon which the court acted are contained in the record. The judgment of the District Court will be reversed, and the cause remanded for another trial. All the justices concurring.

JOHNSTON V. ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

Supreme Court, Kansas, January Term, 1896.

[Reported in 56 Kan. 263.]

INFANT INJURED ON TRACK — TRESPASSER — DUTY OF RAILROAD COMPANY. — 1. An infant two years old, which strays upon a railroad track, and is injured by a passing train, cannot be charged with contributory negligence; and, although it be a trespasser, it is yet the duty of the employees of the company to avoid injury to it if they see it in time to do so. 2. The fact that the engineer in charge of a train of cars saw a helpless infant standing on the track ahead of his train may be inferred, if the evidence proves it, from circumstances; and in this case it is held that there was some evidence to be submitted to the jury.

(Syllabus by the Court.)

ERROR from Butler District Court. The facts appear in the opinion. *Judgment reversed.*

“Action by Cora E. Johnston, by her next friend, Calvin R. Johnston, against The Atchison, Topeka & Santa Fe Railroad Company to recover damages for bodily injuries.”

G. P. AIKMAN, for plaintiff in error.

A. A. HURD, O. J. WOOD and W. LITTLEFIELD, for defendant in error.

Allen, J. — The facts of this case, as presented by the evidence offered on behalf of the plaintiff in error in the trial court, are substantially as follows: The plaintiff, a child two years old, resided with her parents in Butler county, on a farm about three and one-half miles northeast from Augusta. The track of the defendant's railroad passed through the lands on which Johnston lived, and within a short distance from the house. There were five children in the family, the oldest being nine years old at that time. Johnston's corral was situated across the track of the railroad, and he and the members of his family were accustomed to go to it by a path leading from the house across the railroad. On the evening of the 27th of October, 1889, which was a bright, clear day, some time between sundown and dark, the older children and an aunt of theirs were over at the corral feeding the stock. The plaintiff wandered away from the house, and went upon the track of the railroad at a little distance from the place where the path crossed it. She had on a dress of light-brown and white-checked gingham. A freight train, consisting of about nine cars, partly loaded, came from the northeast, running at the rate of about twenty-five miles an hour. Northeast from the house in which the Johnstons lived, and at a distance of about 315 feet from the point where the plaintiff was injured, there is a railroad crossing. When the train reached this crossing, the whistle was sounded. The mother of the child had started from the house in search of it, and saw it standing on the track. She ran to get it, but, before she could get to it it was struck by the engine, and thrown into the ditch. Although it was severely bruised, and four of its teeth knocked out, no bones were broken. The father of the plaintiff testified that there was a whistling post about 1,000 feet northeast from the crossing, but that the first whistle that he heard was when the train reached the crossing, and again, after it had passed the crossing, three or four short blasts were given. He was in such a position that the house

prevented him from seeing the accident, but he saw a man on the step of the engine before it reached the child. No effort appears to have been made to stop the train. There is no direct statement of any witness showing that the engineer or fireman saw the plaintiff before she was struck, but witnesses testified that she could have been seen for a distance of 1,600 or 1,700 feet from the track northeast of where she was. A demurrer to the plaintiff's evidence was sustained by the court, and judgment entered in favor of the defendant. It is not contended in support of the ruling of the court that the plaintiff was of sufficient age to be chargeable with negligence contributing to her injury; but it is claimed that she was a trespasser, to whom the company owed no duty, unless her presence in a position of danger was known to some employee of the company on the train who could have prevented injury to her. Whether the engineer and fireman, in the discharge of their duties, could and ought to have kept such a lookout along the track ahead of the train as would necessarily have discovered the plaintiff in time to stop the train, and avoid injury to her, is a question we do not feel warranted in answering, as a matter of law. It does appear in this case that between the approaching train and the child there was a public crossing, where people passing along the public highway had a right to go across the track. In approaching such crossings, it is clearly the duty of the engineer to be on the alert, not merely for the purpose of avoiding injury to persons and property crossing the track, but also for the protection of his train and all that is upon it. The child was but a short distance from this crossing. We cannot say that there is absolutely no evidence tending to show that the engineer or fireman, or both of them, did actually see the plaintiff in her position of danger in time to have stopped the train, or, at least to have slackened its speed to such a degree that the mother running towards it, might have rescued it from danger. It was the duty of the engineer to be looking towards the crossing, and in the direction of the plaintiff. Did he look, and did he see her? These questions, we think, were for the jury, and that it was not imperatively required of the plaintiff to prove by the direct statement of a witness that the engineer or the fireman actually saw her. There were circumstances, possibly quite slight and unconvincing, tending to show that he did actually see her. If so, it is quite clear that it was his duty to avoid injuring her.

It is argued that the parents of the plaintiff were negligent and that, while the plaintiff herself was too young to be guilty of contributory negligence, yet the negligence of the parents should be imputed to her. We do not think the facts disclosed by the testimony render it necessary to now pass on the question of imputed negligence. The child had escaped from the house but a very few minutes before it was injured, and the mother was already in search of it, and running to get it before it was injured. The testimony of both father and mother tended to show that they were very careful to keep their children away from the track. Though the proof of negligence was not strong, we think the case ought to have been submitted to the jury.

The judgment is reversed, and a new trial ordered. All the justices concurring.

NOTES AND ABSTRACTS OF KANSAS CASES RELATING TO COLLISIONS, CROSSINGS AND ACCIDENTS ON RAILROAD TRACKS.

In addition to the Kansas cases on Collisions and Crossings, reported in this volume, *ante*, see the following notes and abstracts of decisions on the same topics:

PASSENGER INJURED IN COLLISION BETWEEN TRAINS.
— **CHICAGO, KANSAS & WESTERN R. R. CO. v. RANSOM**, 56 Kan. 559 (1896), passenger injured in collision at crossing; railroad company not relieved from liability by reason of negligence of another company, where the carrier could, by exercise of care and diligence, have avoided injury to plaintiff; judgment for plaintiff for \$2,500 affirmed.

See also **CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. v. GROVES, ADM'R**, 56 Kan. 601 (1896), where it was held that "a railroad company running a train in charge of its own servants on the track of another company by its permission, under an arrangement that the train dispatcher and operators employed by such other company may stop the train at pleasure at any telegraph station, is nevertheless liable in damages for injuries resulting in the death of a passenger on the train of such other company by reason of the negligence of the engineer in running his engine into it, although the negligence of such train dispatcher and operators and of the crew of the train of such other company may have been greater than that of such engineer." Judgment for plaintiff for \$5,500 in the Wyandotte Court of Common Pleas affirmed.

In **CHICAGO, KANSAS & WESTERN R'Y CO. v. BELL**, 1 Kan. App. 71 (1895), passenger injured in collision, judgment for plaintiff was reversed, the official syllabus stating the case as follows: "In an action brought to recover damages for a personal injury, the allegation in the petition that the injury was caused by the negligent management of a train of cars whereby the engine and some of the cars were violently backed into the car in which the plaintiff was a passenger, does not authorize the court to instruct the jury that they may find for the plaintiff if they believe the defendant was guilty of negligence in permitting the plaintiff to remain in the car after it had reached its destination, regardless of the negligent handling of the train."

COLLISION BETWEEN VEHICLE AND TRAIN AT CROSSING. — In **ROACH, ADM'X v. ST. JOSEPH & IOWA R. R. CO.**, 55 Kan. 654 (1895), it was held that "a person who drives a team onto a railroad crossing at a time when a regular passenger train is about due, and neglects to look for an approaching train which he might have seen in time to have avoided injury to himself if he had looked, is guilty of contributory negligence barring a recovery for an injury received from such train," and judgment for defendant in Brown District Court was affirmed.

In the **ROACH** case (*supra*), it was also held that "whether it is negligence for the engineer not to give signals of danger by whistling or ringing a bell in the neighborhood of a dangerous private railroad crossing, or not, is a question which may properly be submitted to a jury."

LEAVENWORTH, LAWRENCE & GALVESTON R. R. CO. v. RICE, 10 Kan. 426 (1872), collision between vehicle and train at crossing; judgment for plaintiff reversed for erroneous instructions. *Held*, that the omission to give statutory signals at crossing is negligence, but not necessarily gross negligence.

KANSAS PACIFIC R'Y CO. v. RICHARDSON, 25 Kan. 391 (1881), collision between wagon and team and train at railroad crossing of public street; failure to give signals of approach of train; judgment for plaintiff affirmed.

ATCHISON, TOPEKA & SANTA FE R. R. CO. v. HAGUE, 54 Kan. 284 (1894), collision between team and wagon and train at crossing; judgment for plaintiff in the Johnson District Court for \$300 reversed for erroneous instruction as to gross negligence where no evidence as to same was offered.

COLLISION ON STREET RAILWAY TRACK. — In **EDGERTON, RECEIVER (INTER-STATE CONSOLIDATED RAPID TRANSIT R'Y CO.) v. O'NEIL**, 4 Kan. App. 73 (1896), collision of train with plaintiff's wagon while latter was attempting to cross the tracks of the street railway, judgment for plaintiff in the Wyandotte Court of Common Pleas was affirmed, the official syllabus stating the points decided as follows: "A street railway has not exclusive rights to the use of its tracks and ground covered by it, and is constructed and operated on the theory that it is not an additional burden on the highway, but is merely an additional use contemplated when the street was laid out. This necessitates a liberal construction in favor of the rights of the public, and the law is averse to concede any exclusive rights to the portion of the street to railway companies, except where the necessities of the case demand.

"Where one acts erroneously through fright or excitement, induced by another's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened by such negligence, or when he acts mistakenly in endeavoring to avoid an unexpected danger negligently caused by the defendant, he is not guilty of contributory negligence as a matter of law.

"A personal injury from a single wrongful act or negligence is an entirety, and affords ground for only one action. In that action recovery may be had for all damages suffered up to the time of trial and for all which are shown to be reasonably certain or probable to be suffered in the future; and when these are the necessary and proximate result of the act complained of, they need not be specially averred, but are recoverable under the general allegation of damages."

TEAM AND WAGON INJURED IN COLLISION AT CROSSING. — In **PACIFIC R. R. CO. v. HOUTS**, 12 Kan. 328 (1873), appeal from judgment for \$268 for plaintiff for killing of team at railroad crossing by defendant's train, judgment was affirmed, it being held that where a team is injured by a railroad train within the limits of a city, and upon one of its streets, and there was evidence that the train was running at an unusual speed, that no effort was made to stop it, or to warn the person in charge of the team of the approaching danger, that no whistle was sounded, or bell rung, it could not be said that there was no evidence of negligence on the part of the railroad company.

In the Houts case (*supra*), it was also held that an instruction asked by defendant that "it is not negligence, as a general principle, for railroad companies to run their trains at any rate of speed

they may choose," was properly refused, as while such rule might be applied to the running of trains outside of a city, the speed when running through a city was an important factor on the question of negligence. "For a company to run its trains at the highest speed through the crowded streets of a city would be the grossest negligence; and the rate of speed at which those trains may be run is relative to the dangers attendant on such running."

CHICAGO, KANSAS & WESTERN R. R. CO. v. TOTTEN, 1 Kan. App. 558 (1895), team of horses killed and wagon injured while on railroad bridge, in collision with train; judgment for plaintiff reversed.

PEDESTRIAN INJURED AT RAILROAD CROSSING — BACKING TRAIN — GROSS NEGLIGENCE. — In KANSAS PACIFIC R'Y CO. v. POINTER, 14 Kan. 37 (1874), appeal from judgment for plaintiff in the Atchison District Court, the syllabus of the official report states the case as follows: "Where a person has been run over by a railroad train and injured, in an action for damages therefor a finding that the injury was caused by the gross negligence of the company will not be set aside when it appears that he was run over by a train consisting of a locomotive, tender, one baggage and two passenger cars, which was started backward over a public crossing, in a populous city, with the brake on the engine out of repair and useless, with no brakemen at the other brakes, with no flagman or other person at the rear of the train, or at the crossing, to warn persons of their danger, and no one on the train except three persons, who were all on the locomotive, without the blowing of any whistle, though with the ringing of a bell, and along a track which from the locomotive could not be seen for a distance of from forty to fifty feet from the rear of the train." Judgment for plaintiff for \$5,000 affirmed. See former decision in this case, reversing judgment for plaintiff for \$6,500, in 9 Kan. 620.

In the POINTER case (*supra*), the Supreme Court held that "where three successive juries have, on a doubtful question of negligence, found for the plaintiff, this court should be clearly convinced of the existence of error before it orders the setting aside of the third verdict. Motion for rehearing overruled, 14 Kan. 56.

CONTRIBUTORY NEGLIGENCE. — In KANSAS PACIFIC R'Y CO. v. POINTER, 14 Kan. 37 (*supra*), it was held that "where the term *negligence* is used without any qualifying word, it will be generally understood that *ordinary negligence* is meant. Where the plaintiff is guilty of ordinary negligence, contributing directly to the injury, he cannot recover, except perhaps in cases of wanton and

wilful injury. Contributory negligence on the part of the plaintiff is matter of defense; and if the record shows negligence of the defendant, and is silent as to the conduct of the plaintiff, a judgment for the plaintiff will be upheld."

See also, on the question of negligence, the discussion of the subject by VALENTINE, J., in *YOUNG v. UNION PACIFIC R'y Co.*, 19 Kan. 488.

DUTY OF TRAVELER ABOUT TO CROSS RAILROAD TRACK. — In *UNION PACIFIC R'y CO. v. ADAMS*, 33 Kan. 427 (1885), it was held that "it is the duty of a person about to cross a railroad track to make a vigilant use of his senses, as far as there is an opportunity, in order to ascertain whether there is a present danger in crossing. A failure to listen or look, when by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury."

See also *CLARK v. MISSOURI PACIFIC R. R. Co.*, 35 Kan. 350 (1886); *WICHITA & WESTERN R. R. Co. v. DAVIS*, 37 Kan. 743 (1887); *ATCH. TOP. & SANTA FE R. R. Co. v. TOWNSEND*, 39 Kan. 115 (1888); *ATCH. TOP. & SANTA FE R. R. Co. v. PRIEST*, 50 Kan. 16 (1892); *CHICAGO, KANSAS & WESTERN R. R. Co. v. FISHER*, 49 Kan. 460 (1892).

See also NOTE ON THE RULE OF "STOP, LOOK AND LISTEN," in 9 Am. Neg. Rep. 408-416.

CLIMBING OVER CARS AT CROSSING — CONTRIBUTORY NEGLIGENCE. — In *HOWARD v. KANSAS CITY, FORT SCOTT & GULF R. R. CO.*, 41 Kan. 403 (1889), person injured at railroad crossing, judgment for defendant in the Linn District Court was affirmed, the syllabus of the official report stating the case as follows: "Plaintiff and her husband, who were about sixty years of age, were passing along the principal street of La Cygne, which is crossed by a railroad track. Upon reaching the crossing, they found the street blocked by a train of freight cars. Plaintiff's husband went to the north end of the train in search of a safe crossing, but finding a number of cars standing on the siding, returned to the crossing and waited for the opening or departure of the train fifteen minutes, when one of the trainmen of whom plaintiff inquired how long the train would remain there, replied, 'A good while,' and suggested to them to climb over the train. Instead of going around the train or waiting for its departure, they acted upon this suggestion, and climbed over a coal car in the train, and the plaintiff, in jumping or getting down on the opposite side of the train, struck

her foot against a tie of the track, which was in proper position, and broke one of the bones of her leg. *Held*, in an action against the railroad company to recover for the injury, that her attempt to climb over the train under the circumstances amounted in law to contributory negligence, and the direction of the trainman to cross over the train did not justify plaintiff in encountering so obvious and great a danger."

PERSON WALKING ON TRACK KILLED BY TRAIN — RAILROAD NOT LIABLE. — In **TENNIS ADM'R V. INTER-STATE CONSOLIDATED RAPID TRANSIT R'Y CO.**, 45 Kan. 503 (1891), person killed on track, judgment for defendant was affirmed, the syllabus of the official report stating the case as follows: "Where, in an action by an administrator against a railway company for negligently killing his decedent, it appeared that the decedent was passing along the double track of the defendant's road in a westerly direction within the limits of a city, and discovered a train coming toward him, and to avoid such train, stepped from the track upon which he was walking to the one immediately north, and, before he had taken more than two or three steps, was struck and killed by the engine of a train going west, and the accident did not occur in a public street of the city, and the train was not running at an unusual rate of speed or in violation of any ordinance of the city, and a demurrer was sustained to the evidence by the trial court. *Held*, that it was not error."

CONTRIBUTORY NEGLIGENCE IN CROSSING RAILROAD TRACK. — In **CHICAGO, KANSAS & WESTERN R. R. CO. V. FISHER, ADM'R**, 49 Kan. 460 (1892), judgment for plaintiff for \$3,000 rendered in the Shawnee District Court, was reversed, it being held that "where a person has full knowledge that from ten to twenty railroad trains pass a certain crossing daily, and knows that a certain railroad train which he has just seen a short distance away may at any moment pass such crossing, and where a temporary gust of wind temporarily fills the air with dust, which is not likely to last to exceed four or five minutes, and which to some extent obscures his view, it is negligence for him to attempt to cross the railroad tracks at such crossing on a fast walk without stopping or looking." The Supreme Court (per VALENTINE, J.), said: "In our opinion, it is the duty of any person intending to cross a railroad track where he knows that trains frequently pass, and where he knows that one is likely to pass at any moment, to look as well as to listen, and if dust should temporarily obscure his view, to wait until the dust shall pass away before he attempts to cross." **Geo.**

A. PECK, A. A. HURD and ROBERT DUNLAP, appeared for plaintiff in error (defendant below); D. C. TILLOTSON and J. G. WATERS, for defendant in error (plaintiff below).

In **CAMPBELL, ADM'R V. KANSAS CITY, FORT SCOTT & MEMPHIS R. R. CO.**, 55 Kan. 536 (1895), the syllabus to the official report states the case as follows: "C., a man of mature years and in the possession of his faculties, went upon a railroad track where there was no crossing, about the time that a passenger train was due to pass over the same; and, while walking between the rails, the passenger train approached, going in the same direction as C., and when he was seen by the engineer, the whistle of the engine was repeatedly sounded and the speed of the train checked, but it was not stopped until it came in contact with C. and killed him. *Held*, upon the testimony, that C. was a conscious trespasser, and that there can be no recovery for his death unless the injury was wilfully or wantonly inflicted; that, under the circumstances, wilful or wanton negligence on the part of the engineer could not reasonably be inferred, and that the trial court ruled correctly in sustaining the demurrer to plaintiff's evidence." *Held*, also, that "when an engineer sees an adult person walking upon the railroad track in front of a moving train, who appears to have the use of his senses and not to be under any physical or mental disability, he has a right to presume that the trespasser will heed the warnings given, and will step from the track in time to avoid injury."

Trespasser injured on trestle — Railroad not liable. — **MASON v. MISSOURI PACIFIC R'Y CO.**, 27 Kan. 83 (1882), person walking on trestle work on railway bridge run over by handcar; railroad not liable to trespasser unless injury caused by wilful or wanton negligence; judgment for defendant in Wyandotte District Court affirmed.

Shipper injured in collision. — **UNION PACIFIC R'Y CO. v. HARWOOD**, 31 Kan. 388 (1884) shipper injured in collision while loading cars; judgment for plaintiff affirmed.

The following cases relate to Accidents to Children on Railroad Tracks and Crossings:

CHILD RUN OVER BY COAL CAR ON SIDE TRACK — NEGLIGENCE FOR JURY. — In **ATCHISON, TOPEKA & SANTA FE R. R. CO. v. SMITH**, 28 Kan. 541 (1882), child run over on railroad track, judgment for plaintiff in the Osage District Court for \$5,000 was reversed, the syllabus of the official report stating the case as follows: "The Atchison, Topeka and Santa Fe R. R. Company owned a side track about 450 feet in length, situated wholly upon its own right of way, and partially within and partially

outside of the corporate limits of Osage city, Osage county, Kansas, and near several dwelling houses. It was not enclosed by any fence, and children occasionally played upon it. A coal shaft was situated by the side of it, about 300 feet from where it connected with the main track; and from the coal shaft toward the main track it descended to a point within about seventy-five feet from the main track, and then ascended to the main track; so that cars loaded at the coal shaft would descend of their own weight to the lowest point, or beyond it, but would finally settle at that point. One car was loaded at the coal shaft, and was allowed to run down the side track to the lowest point, where it settled and remained. Afterward another car was loaded and allowed to run down against the standing car, and in so doing the plaintiff, who was on the track, and who was a child two years and twenty days old, was run over and injured. Whether the employees at the coal shaft looked to see whether the track was clear, before permitting the second car to run down the side track, is a disputed question of fact; and whether the plaintiff was under or behind the first car, and was run over by the first car as well as by the second, is also a disputed question of fact. But, supposing that the employees at the coal shaft did not look before permitting the second car to move, and supposing that they could not have seen the plaintiff if they had so looked, then, *held*, that the acts and omissions of the employees at the coal shaft did not constitute culpable negligence *per se*, for which the court could, as a matter of law, declare the railroad company to be responsible. While the failure of the employees to look to see that the track was clear (provided they did so fail to look) may be called negligence, yet, under the circumstances above supposed, such failure to look did not cause the injury complained of, nor contribute thereto, and therefore cannot be called culpable negligence so as to make the railroad company responsible in this case." There were also errors in refusing certain special instructions requested by defendant. Judgment for plaintiff reversed. Opinion by VALENTINE, J. GEORGE R. PECK and A. A. HURD, appeared for plaintiff in error; VANDEVENTER & MARTIN and ELLIS LEWIS, for defendant in error. On a former appeal in the SMITH case, judgment for defendant was reversed, the question of negligence, on conflicting evidence as to facts, being for jury and not for the court. 25 Kan. 738 (1881).

BOY RUN OVER ON RAILROAD TRACK — EVIDENCE. — In KANSAS PACIFIC R'Y CO. v. WHIPPLE, 39 Kan. 531 (1888), boy run over on railroad track, judgment for plaintiff for \$7,500 was reversed, the syllabus of the official report stating the reversible error as follows: "In an action against a railroad company for

recklessly and wantonly injuring a little boy nine years of age, who was on the track and was run over by one of defendant's engines, it was error not to allow defendant to ask a witness, who was the fireman on the engine, and had testified to all the facts, whether the boy had ample time to get off the track after the engineer blew his danger whistle before he was struck by the engine." The court discussed the rule in regard to negligence of adults and negligence of infants, and also as to the liability of railroad company for wilful and wanton negligence, even where a person has carelessly put himself in a place of danger.

CHILD CLIMBING OVER CAR AT CROSSING — RAILROAD NOT LIABLE. — In **ATCHISON, TOPEKA & SANTA FE R. R. CO. v. PLASKETT**, 47 Kan. 107 (1891), child injured while trying to climb over car at railroad crossing, judgment for plaintiff in the McPherson District Court for \$6,000 was reversed, the syllabus of the official report stating the case as follows: "Where a railroad company stops its train not to exceed a minute, as it approaches a railroad crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, on his way home from school, attempts to take hold of the brake ladder on a freight car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get onto the car, and jerks him off so that he falls under the wheels and is run over and injured, and the trainmen have no knowledge of the attempt upon the part of the boy to board the train, *held*, that the company is not guilty of such negligence toward the boy as to render it liable for damages on account of such injury." (The court [per GREEN, C.], cited **CENTRAL BRANCH UNION PACIFIC R. R. Co. v. HENIGH**, 23 Kan. 347, and **ATCHISON & NEBRASKA R. R. Co. v. FLINN**, 24 Kan. 627, the principle decided in these two cases settling the question of the liability of the railroad company in this case).

The case of **ATCHISON, TOPEKA & SANTA FE R. R. Co. v. PLASKETT** (No. 5665), was submitted with the case of the same title (see preceding paragraph), also from the McPherson District Court. All of the questions involved in this case were also involved in that, and the judgment of the court below was reversed upon the authority of that case. 47 Kan. 112.

Motions for rehearing in the **PLASKETT** cases (*supra*), were denied. 47 Kan. 112. The counsel in the cases were **GEORGE R. PECK**, **A. A. HURD** and **ROBERT DUNLAP**, for plaintiff in error; **LUCIEN EARLE** and **C. M. BRUCE**, for defendant in error.

The PLASKETT cases (*supra*), are reported in full in 3 AM. NEG. CAS. 454 and 457.

CHILD TRESPASSING ON TRACK KILLED BY TRAIN — NEGLIGENCE OF RAILROAD COMPANY. — In **UNION PACIFIC R'Y CO. v. URE**, 56 Kan. 473 (1896), the syllabus states the case as follows: "In a suit for an injury resulting in the death of a child two years old, the jury found that the engineer saw the child in dangerous proximity to the track in time to have stopped the train and prevented the injury, if he had immediately used all the appliances provided on his engine for that purpose, but that he did not exercise proper care, and failed to do so. *Held*, that said facts are sufficient to uphold a verdict against the railway company, and it is immaterial whether the court erred or not in an instruction making a distinction as to the point of time when duty of the company arises toward a conscious and an unconscious trespasser upon its track." Judgment for plaintiffs for \$3,000 in the Sheridan District Court affirmed.

CHILDREN INJURED BY TRAINS. — ATCHISON, TOPEKA & SANTA FE R. R. CO. v. CALVERT, 52 Kan. 547 (1893), child, two years old, run over by train on track; judgment for plaintiff for \$800 affirmed.

ATCHISON, TOPEKA & SANTA FE R. R. CO. v. TODD, ADM'R, 54 Kan. 551 (1895), boy sitting under freight car in railroad yard killed by backing of engine against car; trespasser; railroad company not liable; judgment for plaintiff for \$650 reversed.

UNION PACIFIC R'Y CO. v. YOUNG, 57 Kan. 168 (1896), child playing on railroad track injured by backing of train; evidence insufficient to sustain verdict; judgment for plaintiff for \$5,000 reversed.

MISSOURI PACIFIC R'Y CO. v. COOPER, 57 Kan. 185 (1896); boy, eleven years old, attempting to climb over freight cars at street crossing, injured by sudden start of train; evidence insufficient to show trainmen's knowledge that boy was between the cars, or that the injury was wilfully or wantonly inflicted; judgment for plaintiff for \$5,000 reversed.

ATCHISON, TOPEKA & SANTA FE R. R. CO. v. MCFARLAND, 2 Kan. App. 663 (1896), child, twenty-two months old, fatally injured by being run over at railroad crossing; judgment for plaintiff for \$1,000 reversed, evidence being held insufficient on question of negligence of railroad company.

CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. v. KENNEDY, 2 Kan. App. 693 (1896), boy struck by train at crossing; judgment

for plaintiff for \$1,250 reversed for erroneous instructions as to negligence.

As to Liability of Railroad Companies for Injuries to Children, see NOTE ON TURNABLE CASES, in 9 Am. Neg. Rep. 611-616.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. LONG.

Court of Appeals, Kentucky, January Term, 1893.

[Reported in 94 Ky. 410.]

PASSENGER CAR LEFT STANDING ON TRACK — FAILURE TO WARN APPROACHING TRAIN — GROSS NEGLIGENCE. — The employees of a railroad company in charge of a mixed freight and passenger train were grossly negligent in leaving a passenger car on the track when a freight train was approaching without notifying the latter of the fact or using proper care to flag the approaching train in time to avoid a collision.

BOARDING CAR AWAY FROM STATION PLATFORM. — Where a passenger boarded a car without notifying the conductor, the car being fifty feet from the platform, and it was the custom of passengers to board trains wherever the convenience of those in charge required according to the rules of the railroad company, she was not guilty of contributory negligence in boarding the train at such place (1).

FAILING TO ESCAPE FROM IMPENDING DANGER. — The fact that passengers, who with plaintiff were warned of the impending danger, succeeded in getting out of the car before the collision, does not show contributory negligence of plaintiff.

EXCESSIVE DAMAGES. — Where plaintiff's injuries were serious, yet as the evidence did not satisfactorily show that such injuries were permanent, a verdict for \$26,000 was excessive (2).

GROSS NEGLIGENCE — PUNITIVE DAMAGES. — Where defendant was guilty of gross neglect, both compensatory and punitive damages may be awarded.

APPEAL from Carroll Circuit Court. The facts appear in the opinion. *Judgment reversed.*

WINSLOW & WINSLOW and WILLIAM LINDSAY, for appellant.
GAUNT & DOWNS and J. A. DONALDSON, for appellees.

1. For other actions involving a large amounts have been held not to similar point as to boarding trains away from station platform, see vols. 2-7 AM. NEG. CAS., and vols. 1-9 Am. Neg. Rep. be excessive, 2 AM. NEG. CAS. 535-536; and also NOTE ON DAMAGES, in which verdicts have been reduced and remittitur required, 5 Am. Neg. Rep. 232-233; in both of which notes a list of authorities in the several States are given.

2. See NOTE ON DAMAGES FOR PERSONAL INJURIES, in which verdicts for

Pryor, J. — The verdict and judgment in this case was for \$26,000.

In the month of June, in the year 1889, the appellee, Nettie Long, the wife of her co-appellee, Thomas Long, or her husband for her, purchased tickets for travel on appellant's cars from Eagle Station, where she lived, to Sanders' Station, on the same road, but a short distance below. She entered with her husband and daughter the caboose that constituted a part of freight train No. 32. This train was a local freight train, but was carrying passengers as a carrier under certain regulations by the company, from station to station, located between certain designated points on the road. When the freight train reached Eagle Station, where the passengers entered the caboose, the conductor detached his engine from the caboose and a part of the cars, leaving them on the main track, and took the engine, with the cars attached to it, on the switch to unload some freight, or for some other purpose. The caboose seems to have been the only car designed for passengers on this train, and when the appellees entered, it was a distance of forty or fifty feet from the platform of the depot. The conductor of this combined freight and passenger train, knowing there was a through freight train coming after him, sent one of his men, or an employee, to flag any approaching train. It is shown that it was customary for the flagman to go a distance of near 1,000 yards to flag coming trains, but in this case the proof conduces to show that the flagman went only about 200 yards, and was then, from his movements, paying but little attention to his duties, and, on the trial of this case, seems not to have been present to aid in solving the mystery connected with the collision of this passenger train on the main track and the through freight train.

It may be assumed, from the testimony as to his conduct, that he neglected to flag the through train to slow up, and before they could slow up, or the brakeman properly apply the brakes, the caboose was run into and demolished by this through train. It is shown by the testimony of those in charge of the train that the whistle was blown at the proper time and place, signifying its approach, and that the accident resulted from a failure of the brakes, for some cause, to work properly, as they approached the station. No reasonable explanation has been given of this sudden stubbornness on the part of the brakes at this particular place, having worked well during the entire trip until it neared

this station, and it is, therefore, manifest that the flagman either failed to notify those on the through train to slow up, or that those in charge of it were so reckless as to continue the speed of the train until they saw the danger ahead, when it was too late to avert it; and we are inclined to conclude that the flagman failed to give the proper signal, and from that fact the injury resulted.

The caboose was left on the main track by the conductor, when he knew the freight train was approaching, and knowing that fact, it was his duty to have exercised the highest degree of caution in notifying the through train that another was on the track. That there was negligence on the part of these employees of the grossest degree, is evident from this record, and this conclusion is reached from the undisputed facts, looking alone to the testimony for the defense.

The appellee, Mrs. Long, was knocked out of the caboose, and was found lying between the main track and the switch unconscious, and badly bruised about the head, neck and shoulders. She was confined to her bed for four weeks, with her family physician attending her. Since that time he has not administered to her any medicine, or been applied to for relief from the pain she claims she is suffering. It is claimed that her kidneys are affected, with a constant desire to urinate, and that the water flows from her involuntarily; that she is deaf, and one of her eyes affected by the injury. Her physicians, or those who have examined her, find no objective symptoms that would indicate permanent injury, and the weight of the testimony conduces to show that she has not received any lasting injury, or if not, her own family physician, as well as other eminent physicians and surgeons, are not able to say that she is permanently injured, but from careful examinations of her person are inclined, at least some of them, to the contrary opinion. That the shock was great, and her entire nervous system seriously affected, there can be no doubt, but that she is permanently injured this court is not authorized to say from the testimony before us.

The other passengers succeeded in leaving the caboose and escaping without material injury, and it is claimed that the appellee was guilty of contributory neglect in not leaving the car sooner, and of like neglect in going upon the caboose without first notifying the conductor, and at a point fifty feet from the depot platform. As to boarding the train from the platform,

the rules of the company required the passengers to get on from the road-bed, or wherever the convenience of those in charge of the train required, and such was the custom when converting this caboose into a passenger car, for the passengers would all know that it would at times be difficult and subject the conductor of this local freight train to a great inconvenience, if required to have the caboose opposite the platform that passengers might enter. The appellee and her husband were doing what the rules of the company expected of them, and in fact the appellee's husband had been the depot agent at Eagle for many years, and was the agent when this collision took place.

We have given this record careful consideration, and find no evidence of contributory neglect on the part of either the appellee or her husband, and the issue in this case is as to the negligence of the defendant's employees — if merely ordinary, compensation was the measure of damages; if gross, the jury had the right to find punitive damages; and from the facts of the record, *as now presented*, the jury being authorized to find the highest degree of neglect, which was gross neglect, the only question before us is, were the damages excessive? And upon this branch of the case if no evidence had been adduced for the defense, when looking alone to the testimony of the appellees, and her family physician, the damages were greatly in excess of the sum the appellee was entitled to recover.

That Mrs. Long was an estimable woman, and at the time of the injury was in the prime and vigor of her womanhood, possessed of every attribute that endeared her to her family, her neighbors and her friends, is shown by the record, and as presented to this court in eloquent terms by counsel, and no doubt with much greater effect to the jury deciding this case. That the triers were honest, fair-minded men there can be no doubt, but when the wife of the neighbor, of the friend, of the countryman, proud of the lovely character pictured by counsel, has been placed in such imminent peril, and suffered so by reason of the neglect of one that has no breath of life, except as imparted by the steam that moves it, human sympathy often controls the judgment, and justice is not measured out by verdicts and judgments, as it would be between neighbor and neighbor, when like neglect results in injury.

Nor would this or any other court confine the jurors only to such verdicts as are usually rendered between others than

corporations. Carriers of passengers owe to them a special duty, and that is to exercise the highest degree of care for the protection of their person from danger by the neglect of those in their employ. This duty should be exacted, and by the imposition by way of punishment when gross neglect appears. This, however, should be done in a rational way, and not, as has been before said in this court, by placing the juror in the position of the husband, whose wife has been injured, or that of the wife, and then asking the question, what sum of money would you take to have your wife placed in such peril, or so injured as that skilled surgeons could not say whether the injury was or not permanent.

The apprehension that serious results might follow would not be entertained by the true husband or wife for the value of the entire railroad; but this is not the way of ascertaining the damages, nor is there any fixed rule by which a court or jury can arrive at what is the sum the plaintiff is entitled to; for it is a character of case where the wrong cannot be repaired by mere dollars and cents, or the damages sustained of a character that can be computed in that way. We have been referred to several cases by counsel, where similar verdicts in amount have been sustained where the party injured was made a mental or physical wreck by the negligence of the defendant, but the facts of this case do not show such an injury. There is but little contrariety of opinion with the physicians as to the result of the injuries, and all save one see nothing, after examining the plaintiff, that would indicate permanent disability. In the case of *Shaw v. Boston & Worcester Railroad*, 8 Gray (Mass.), 45, the injury was such that the wife lost her left arm and a part of the right hand. Her right arm was broken so that it never united. She could not feed or dress herself, with her health and memory much impaired, and other serious wounds upon her person. The character of the finding in cases like this is to be tested, at least as to the amount, by the average verdicts in cases growing out of personal injuries, when we are considering the question of excessive damages, by looking to the findings of juries in the past, and their approval or disapproval by courts of last resort — such sums as are ordinarily awarded for such injuries; and when comparing these cases with the one before us, can it be said that the damages at first blush are far too much, and such as the mind, free from passion or prejudice, would say was excessive? Taking,

therefore, the verdicts in this State, without enumerating them, as found in reported cases, where the injury was as great or greater than here, and the largest verdict sustained is one for \$15,000, and this was a case where both legs were amputated, and the neglect as great as in the case before us. *Kentucky Central R. R. Co. v. Smith, etc.*, 93 Ky. 449 (1).

The damages and finding by juries in cases of wilful neglect, where death was the result of the injury, have not exceeded this sum. These cases having been passed upon, during the existence of corporations for many years, conduce to show what courts and juries have considered as a reasonable sum to be awarded in this class of cases, the verdict in each case lessened or increased by the particular facts and circumstances surrounding it.

In the case of the *Louisville Southern R. R. Co. v. Minogue*, 90 Ky. 369, the plaintiff sustained external bruises and her nervous system was greatly shocked. She was confined in her bed for eight weeks, and since she left her bed had been unable to walk. The verdict was for \$10,000. This court held the verdict excessive, because it was not shown with reasonable certainty that there was a permanent injury, the medical testimony being as unsatisfactory in that case as in the one before us. It is truly said that a court of last resort should be careful in interfering with the verdicts of juries in cases where the sum to be awarded in damages is within the discretion of the jury, even to the extent claimed by the plaintiff, but this discretion on the part of the jury must be a legal discretion, and in its exercise, if the damages are erroneous, and so appear to a rational mind at first blush, it is not only the right but the duty of the court to interfere and set the verdict aside.

We perceive no objection to the instructions, save the word wilful, in fixing the degree of neglect, has now no place in the law, and in fact has no place in this case, as the common-law rule governed, and not that fixed by statute where death ensues.

The question, as already indicated, is, was the injury caused by the neglect of the appellee's employees when in the discharge of their duty? If so, was it ordinary or gross neglect? If the first, compensation is the measure of damages; if the last, both compensatory and punitive damages may be awarded. On another

1. See the *Smith* case, reported with the Kentucky cases in this volume, *post*.

trial contributory neglect may be shown, and we have only said that none appears from the facts as they are now presented.

Reversed and remanded for a new trial consistent with this opinion.

RIGHT TO RECOVER INDEMNITY FROM JOINT WRONG-DOER. — In **CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R'Y CO. v. LOUISVILLE & NASHVILLE R. R. CO.**, 97 Ky. 128 (1895), the facts are stated by **PRYOR**, Ch. J., as follows:

“ The plaintiff in operating its railroad extending from Cincinnati, Ohio, to Chattanooga, Tenn., as a carrier of passengers and freight, had to cross certain railroad tracks of the defendant at Junction City, in the county of Boyle, and the manner as well as the time of crossing was known to the defendant or its agents in charge of the operation of its trains at that place.

“ That in November of the year 1890, with a passenger train of the plaintiff operated in the customary way when crossing the defendant's track at Junction City, the defendant through the gross negligence of its agents in charge of defendant's train on the road of defendant, caused the engine and train on defendant's road to run into the train of the plaintiff and break and destroy its cars.

“ That at the time the plaintiff had in its cars numerous passengers (naming them), under a contract of safe carriage between certain terminal points on its road. These passengers were in the car that was demolished, and each and all of them received severe bodily injuries by reason of the collision, and that by reason of its obligation to carry them safely the plaintiff became liable to, and was compelled to pay and did pay to, said persons so injured divers sums of money (naming the amounts), making in all the sum of \$2,827.67.

“ The plaintiff, after reciting these facts, the substance of which is given, made the following averments in his petition: ‘ Plaintiff says that said injuries to said passengers for which it became liable and for which plaintiff was compelled to pay and did pay said sums, *was occasioned wholly* by the negligence of the defendant in running its engine into plaintiff's train, and thereby injuring said passengers who were being carried on plaintiff's train in the way and manner stated.

“ ‘ Plaintiff says the loss sustained by it in the payment of said sum of \$2,827.67 to said persons aforesaid *was occasioned wholly* by the negligence of the defendant in running its said engine into the train of this plaintiff as aforesaid, and in injuring the plaintiff's passengers as aforesaid.’

" Judgment is then asked for the amount paid in damages, etc. A general demurrer was sustained to the petition, the court below holding the facts alleged presented no cause of action.

" The questions arising on the demurrer are interesting as well as important, and if the averments of the petition presented such facts as the argument of counsel for the appellant contended this court must assume existed, there would be much reason for holding the appellant entitled to recover. The claim of the appellant and the right of recovery is based solely upon the alleged negligence of the appellee, not for an injury to the property of the latter but for an injury to the persons of its passengers, with whom the appellant had contracted to carry safely from one point of its road to another."

* * * The points decided by the court are stated in the syllabus to the official report as follows:

" Where passengers on the cars operated by one railroad company are injured by a collision with the cars of another company at a crossing of the two roads, and the former company is compelled to pay damages to its passengers for the injuries they have sustained, it cannot look to the latter company for indemnity upon an allegation that the injuries were caused 'wholly' by the negligence of the latter company. Failing to allege facts showing it was in fact liable as between it and its passengers, it will be regarded as one who has compensated the passengers for a wrong done them by another and then seeks to be substituted to their rights, which cannot be done.

" Even though the carrier which has been compelled to respond in damages to its passengers was in fact liable, still it cannot look to the other carrier for indemnity or contribution, unless it shows it was not an actual participant in the commission of the injury. If both companies were actual participants in the wrong, they will be regarded as *in pari delicto* without regard to the relative degrees of their neglect, and the one which has been compelled to pay is not entitled to indemnity or contribution from the other. The cases in which wrongdoers are held as not being *in pari delicto* are where the one asking for indemnity was not an actual participant in the wrong, but his liability arose by reason of the negligent act of some one acting under his authority, from whom he seeks indemnity (1).

" It is the duty of a railroad company to exercise the utmost degree of human care, diligence and skill in order to carry its

1. See NOTE ON "RIGHT OF INDEMNITY AGAINST CO-DELINQUENT FOR LIABILITY ENTAILED BY HIS NEGLIGENCE," an editorial in the New York Law Journal (April, 1901), appended to

the case of Boston Woven-Hose & Rubber Co. v. Kendall (Mass., March, 1901), 9 Am. Neg. Rep. 496, in which the question of indemnity from joint wrongdoer is discussed.

passengers safely. But it is not an insurer of the life or person of the passenger, and can only be made liable on the ground it has failed to exercise this extraordinary care and diligence for his safety.

"If the company seeking indemnity in this case were seeking to recover for the injury to its cars, the fact that the injury was caused 'wholly' by the negligence of defendant would be sufficient to entitle it to recover." Judgment in Boyle Circuit Court sustaining demurrer affirmed. EDWARD COLSTON, C. B. SIMRALL and GEORGE HOADLEY, JR., and JOHN W. YERKS, of counsel, appeared for appellant; R. P. JACOBS and H. W. BRUCE and JNO. MCCHORD, of counsel, for appellee.

COLLISION AT RAILROAD CROSSING — FAILURE TO STOP BEFORE DRIVING ACROSS TRACK — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.—In *WRIGHT V. CINCINNATI, N-W ORLEANS & TEXAS PACIFIC R'Y CO.*, 94 Ky. 114 (1893), collision between buggy and train at crossing, judgment was reversed, the court (per PRYOR, J.), stating the case as follows:

"In the month of July of the year 1889, the appellant, in company with a friend, was in his buggy, on his way to the Danville fair; and, in crossing the railway track of the appellee, his buggy was struck by a passing train, that demolished it, throwing appellant to the ground, and seriously injuring him. He instituted this action against the railway company, alleging that his injuries resulted from the negligence of its employees, and upon the trial in the court below the jury was instructed to find for the defendant; and this is the error complained of on the present appeal. At a former trial of this case a verdict and judgment were rendered for the present appellant for \$1,000; and, that sum being within the jurisdiction of the Superior Court, an appeal was taken to that court, and the judgment reversed, upon an error committed by the trial court, in requiring the defendant to elect whether it would rely on the general denial of any neglect as a defense to the action, or on its plea of contributory neglect on the part of the plaintiff. The Superior Court held that the pleas were not inconsistent, and that both defenses could be relied on, which we think was proper. On the return of the case, a nonsuit having been ordered, and the sum claimed as damages being within the jurisdiction of this court, the case is now heard.

"It seems that the turnpike and track of the railroad run parallel for some distance; and at or near the point at which appellant started on his journey is a small village, called Moreland, and about

one and one-quarter miles of Moreland is another small village, called Milledgeville. The railway track crosses the turnpike twice between these villages. Moreland is south of Milledgeville, and the appellant was traveling north when the train struck him. Starting, then, from Moreland, when you get eight or nine hundred yards from that town the track of the railway crosses the turnpike; and about seven or eight hundred yards from this first crossing the railway track again crosses the turnpike, about three or four hundred yards of the village of Milledgeville. It is a level country, and the track of the road is in plain view for over a mile from the last crossing, back towards Moreland, whether on the turnpike or the railway, until you get within ninety feet of the second crossing, where the accident happened. For this ninety feet there is a side cut in the turnpike that obstructs the view south, towards Moreland. The train that did the injury was going north, in the same direction the plaintiff was traveling. The testimony shows that after leaving Moreland, and when approaching the first crossing, the appellant looked back to see if there was a train behind him, and, seeing none, passed the first crossing safely. In approaching the second crossing, and when within 200 yards of it, he looked back again, and there was no train; and again, when within seventy-five or one hundred yards of the second crossing, looked again, and saw no train, and then drove onto the track, without looking any more, — traveling, as we conjecture, at the rate of six or seven miles an hour, — and as soon as his buggy was on the track the train struck it. The train was past due, and was running at a rapid rate of speed to make up for lost time, and must have been going at the rate of sixty miles an hour, or at a greater speed. If the distance from where the last look was made is only seventy-five or one hundred yards from the crossing, the buggy could have been driven and passed the crossing before the train could have reached the crossing, if going at the rate of fifty miles an hour; for, if the testimony of the plaintiff and his friend is to be believed, there was no train to be seen at Moreland, or near that village, when the last attempt was made to see if there was danger. It is in proof that the appellant knew the time the train usually passed, and whether or not he had been informed that it was behind does not appear. It is also shown that no signal was given of the approach of the train. This fact appears by several witnesses for the appellant, when four or more witnesses for the appellee swear that signals were given. So, as to the warning given by the approaching train, there is such a conflict in the testimony as required that question to go to the jury, if a controlling fact in the case.

"It is insisted by counsel for the railway company that it is the duty of one on a highway crossing the track of a railway *to stop and listen*, in order that he may know it is safe to cross, and if he had stopped and listened when he reached the track, before going upon it, he might have seen the train, or heard the rumbling noise of its approach, or the sound of its whistle; and, if he failed to do so, it is such contributory negligence as bars the recovery, and authorizes a nonsuit, although the railway company may have been guilty of neglect (1). It is true that the appellant, being within thirty yards of the crossing when reaching the cut, might have looked and seen a train nearly a mile off; but, having exercised the precaution that he did, it seems to us to be a question for the jury to determine, whether or not he exercised the proper care and diligence for his safety. If one approaches a railway track, and attempts to cross, without looking the one way or the other, — no other fact appearing, — and is injured, no recovery can be had, unless the danger is discovered, and could be avoided by the exercise of ordinary care; for if the facts are such as that rational minds, or men possessed of ordinary judgment, must say that the man's own neglect caused the injury, then a nonsuit is proper. It must be conceded that many of the authorities referred to by the appellee sustain the view of the court below, — that it is negligence *per se* not to stop and listen before going upon a railway track, unless the evidence shows that it did not proximately contribute to the injury. This court has not followed or adopted such a doctrine, but, on the contrary, has held that where the circumstances under which one attempts to cross the track of a railway show that degree of care that prudent persons would ordinarily exercise under like circumstances, the negligence resulting in injury from the passing trains ought not to be attributed to the party injured. It is, therefore, in nearly every case, a question of both law and fact; the province of the jury being to pass on the facts, under proper instructions from the court." (*Citing Cahill v. Cincinnati, etc., R'y Co.*, 92 Ky. 345.) * * *

Continuing the court said: "There are but two questions in this case: Did the appellant exercise such care, under the circumstances, as an ordinarily prudent man would have exercised for his own safety? If not, the verdict should be against him. If he did, then the inquiry arises, did the appellee, by its employees, give proper warning of the train's approach, by blowing its whistle, such as would notify one exercising reasonable care for his own safety, of the danger? The care exercised by the appellant, and that of

1. See NOTE ON THE RULE OF "STOP, LOOK AND LISTEN," in 9 Am. Neg. Rep. 408-416.

negligence imputed to the company, are the questions to go to the jury; and the facts in this case will not authorize the court to say, as a matter of law, that either existed. The judgment below should be set aside, and a new trial granted. Reversed and remanded for that purpose."

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. SCHICK.

Court of Appeals, Kentucky, January Term, 1893.

[Reported in 94 Ky. 191.]

JURY VIEW — CODE. — A jury may, even after a case has been submitted, be sent to view the place of accident, under section 318 of the Civil Code, which provides that " whenever, in the opinion of the court, it is proper for the jury to have a view of * * * the place in which any material fact occurred," it may order such view.

OBSTRUCTED VIEW AT CROSSING — FAILURE TO PROVIDE GATE OR WATCHMAN. — Where the view at a railroad crossing in a city was obstructed by reason of a cut, fence, etc., and there was no gate or watchman at the crossing, an instruction that failure to provide a gate or watchman was negligence on the part of the railroad company would have been proper.

APPEAL from Jefferson Court of Common Pleas. The facts appear in the opinion. *Judgment affirmed.*

THOMAS W. BULLITT and JAMES QUARLES, for appellant.

O'NEAL, PHELPS & PRYOR, for appellees.

Bennett, Ch. J. — Wm. Schick, husband of the appellee, resided in Jefferson county, a short distance from the city of Louisville. On the 29th of July, 1883, he visited Louisville in a jersey wagon, and after finishing the business that took him to the city, he started home, taking Mrs. Becker, wife of his neighbor, and Mr. Phister, another neighbor, in the wagon to ride home with him. As they approached the place where the appellant's trains cross Eighteenth street in the city limits, they received warning, by the customary signals, of the approach of a train of cars. They stopped and awaited the passage of said train. And immediately after the said train had passed, Wm. Schick attempted to cross the track with the jersey wagon and party in it, but before he could cross the track another locomotive which was following close upon the first train and running backward at a rapid rate, struck the wagon and knocked it from thirty-five to fifty yards, killing Schick and Mrs. Becker and injuring Phister.

The appellee, widow of William Schick, brings this suit for damages and the trial resulted in a verdict and judgment for \$12,000 in her favor.

The evidence before the jury authorized them to believe that said locomotive did not give any notice that it was approaching the crossing by blowing its whistle or by ringing its bell or otherwise, until it was almost on the jersey wagon, and it was then too late for Schick and party to escape being struck. The evidence also authorized the jury to believe that, owing to some obstructions, as a cut, high fence, etc., Schick and party could not see the approach of the locomotive. It also appears that no gate or watchman was kept at the crossing. From the facts and circumstances in evidence, the jury had a right to believe that the deceased came to his death by the wilful neglect of the appellant.

It appears that after the case had been given to the jury, and they had gone to their room to consider their verdict, they returned into the court room and asked permission to visit the place of the accident in order to view the place themselves. The request was granted, and they were conducted to the place, and did take a view of it. There is no objection made to the manner in which this was done, nor is there any complaint as to the misconduct of the jury. The only objection urged here is, that the court, after the jury had gone to their room to consult of their verdict, had no right to grant the request.

Section 318 of the Civil Code provides: "Whenever, in the opinion of the court, it is proper for the jury to have a view of real estate, which is the subject of litigation, or the place in which any material fact occurred, it may order the jury to be conducted in a body, under charge of an officer, to the place, which shall be shown them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial." Section 119 of said Code relates to the disposition to be made of the jury after the case has been finally submitted to them. Section 321 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of the parties, or after notice to the parties or their counsel."

Counsel contend that the two latter sections control section 318, so as to limit the right of the court to order a view not later than the conclusion of the evidence and argument, but when the jury have taken the case to their room to consider of their verdict, they have no right to receive any further evidence, unless when they disagree as to some part of the evidence that has been submitted to them, then they may be conducted into court, and in the hearing of the parties or their counsel, or after an opportunity has been given them to hear, be informed by the court, or by the witnesses themselves, as to the point of disagreement; and as the view of the place is evidence not introduced before the jury, they can not be allowed, after they have retired to their room to consider of their verdict, to make the view, because they would be receiving evidence not theretofore before them.

We agree with counsel that the place appearing on the view is evidence intended to explain, modify, corroborate or contradict the recollection of witnesses as to it. And we think that under section 318 the court is unlimited as to the time of allowing the view, for as that section contains no limitation as to time, the court has the right to order the view at any time during the investigation of the case by the jury. (See Thompson on Trials, § 908).

We also think the other sections *supra* do not limit section 318. But if they do, we think that section 321 expressly authorizes the course pursued by the court, for said section provides that if the jury disagree as to the evidence, they may be taken into the court room and be satisfied as to it. Now the witnesses had testified about the place, its location and condition, which was an important fact to be ascertained in order to determine the question of negligence and its degree. The place and its condition were thus before the jury all the time in the nature of evidence upon the subject of the appellant's negligence. The jury, it seems, could not take an intelligent view of this place from the evidence of the witnesses concerning it, and disagreeing as to said evidence, they asked the court to let them view the place itself as an object lesson, correcting, explaining or contradicting the verbal testimony in that regard.

We think that the sections *supra* do not limit section 318; but if we are mistaken in this, we think the action of the court is in harmony with section 321.

Counsel for the appellant also object to instruction No. 5,

relating to wilful negligence. That instruction is more favorable to the appellant than the law justifies. The appellant had no gate erected at said crossing, nor any watchman there to warn persons that they might be in danger of being hurt by an approaching train. The view, by reason of the cut, fences, etc., was obstructed. It seems to us, therefore, especially in view of the fact of no gate and no watchman at the crossing in a city like Louisville, and on the street described, an instruction saying that such failure was negligence would have been proper.

We see no injury to the rights of the appellant in the refusal of the court to stop counsel for the appellee, in the course of the argument indulged in by him.

There is no full index to the record of this case; there is no index to the evidence, nor to the instructions, and what index there is is to be found in about the middle of the record. There is no compliance with the law in regard to indexing. The record is not properly indexed, and must be and is condemned.

Judgment affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. SURVANT.

Court of Appeals, Kentucky, September Term, 1894.

[Reported in 96 Ky. 197.]

WILFUL NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — INSTRUCTION. — In an action against a railroad company to recover damages for personal injuries not resulting in death, it was error to instruct the jury as to wilful negligence, as that degree of negligence has no place in the law of this State except in actions resulting in death; and in such actions contributory negligence cannot be relied on as a defense. But as the court in an instruction at defendant's instance, gave defendant the benefit of its plea of contributory negligence, the instruction as to wilful negligence was not prejudicial.

PRIVATE CROSSINGS — PUBLIC CROSSINGS — DUTY AS TO SIGNALS. — Railroad trains are not required to slow up and signal at private crossings along the road; it is only where the way is a public one that reckless speed or the failure to signal amounts to neglect upon the part of the railroad company.

ACCIDENT AT PRIVATE CROSSING — FAILURE TO SIGNAL — HORSE FRIGHTENED — PROXIMATE CAUSE. — Conceding that the failure of defendant to give a signal of the train's approach to a station was negligence as to plaintiff at a private crossing at which the signal could have

been heard if it had been given, that negligence does not make the defendant liable to plaintiff for injuries caused by the frightening of her horse by the train after she had made the crossing in safety.

EXCESSIVE DAMAGES. — Plaintiff's injuries appearing to have been slight, no bones being broken, nor permanent injury shown, a verdict for \$6,000 damages is excessive (1).

APPEAL from Marion Circuit Court. The facts appear in the opinion. *Judgment reversed.*

W. J. LISLE, THOMPSON & MCCHORD and H. W. BRUCE, for appellant.

W. E. & S. A. RUSSELL and W. H. HOLT, for appellee.

Quigley, Ch. J. — This suit was brought to recover damages for personal injuries to the plaintiff, Jennie Survant, and for damage to a buggy, alleged to have been caused by the negligence of defendant in running a freight train upon a crossing over which at the time said plaintiff and her two children were passing in a buggy, whereby the mare hitched thereto was frightened and ran away, running the buggy against a telegraph pole and throwing plaintiff and her children out upon the ground, the plaintiff falling upon her shoulder. Defendant denies all negligence upon its part, and pleads contributory negligence on the part of plaintiff. Defendant also alleges in its answer that the crossing where the accident occurred was a private crossing, which is denied by plaintiffs in their reply, and the fact as to whether or not the road she was traveling at the time of the accident and the crossing was a public or private road, or a public or private crossing, is in issue. Upon the trial of the case the jury found a verdict for plaintiff for \$6,000.

Defendant's motion for a new trial having been overruled, it prosecutes this appeal to reverse the judgment of the lower court and have a new trial granted, and assigns the following reasons therefor: First. The damages are excessive, appearing to have been given under the influence of passion or prejudice. Second. The verdict is not sustained by sufficient evidence and is contrary to law. Third. Error in the court in giving to the jury instructions A, B and C; and fourth, error in the court in permitting improper testimony to go to the jury. We find no error in instructions A and B, but instruction C is clearly improper, and should not have been given. It reads as follows: "Wilful

1. See NOTE ON DAMAGES, appended to *Louis. & Nash. R. R. Co. v. Long*, 94 Ky. 410, on page 579, *ante*.

negligence is an intentional failure to perform a known or manifest duty in which the public has an interest, or which was important to plaintiff in avoiding the injury to her if she sustained any injury." Such an instruction is proper only under the statute in cases where death ensues from the wilful negligence of another, and in which punitive damages may be awarded, and in such actions contributory neglect cannot be relied upon as a defense. In all other cases, contributory negligence may be pleaded as a defense.

But in this case this instruction was not prejudicial to defendant, the court, at defendant's instance, having instructed the jury as to contributory negligence on the part of plaintiff. The other reasons assigned grow out of and are based entirely upon the evidence. So that, for the purposes of this appeal, it is necessary only to consider the facts.

It appears from the evidence that Northfork and Gravel Switch are two railroad stations on the Knoxville branch of defendant's road in Marion county, Kentucky, about one mile apart. There are two roads from Northfork to Gravel Switch — one by the old pike or county road, the other over the land of Al. Pipes. The distance between the stations by the county road is about three miles, and by the Pipes road about one mile. The railroad does not cross the county road between these stations, nor does it appear that there is a public crossing of the said road at Northfork; but about midway between them, on the Pipes road, there is a railroad crossing. Between Northfork and this crossing, on the Pipes road, there are three or four gates, and before this road reaches the crossing, it runs parallel with the railroad track for three or four hundred yards and within about that distance of it. After the road gets to the crossing it runs the balance of the way over the right of way of defendant, and parallel with its track, to Gravel Switch. On the Pipes road, beginning at a point about 300 yards from the crossing and up to within a hundred yards thereof, a traveler thereover cannot be seen by the engineer of a train approaching the crossing from Northfork, because of a cut in defendant's roadbed; but from the crossing and at any point within a hundred yards thereof on the Pipes road, the view of the track towards Northfork is unobstructed for seven or eight hundred yards; from thence on to the station it makes several curves and runs through two or three cuts. From Northfork to Gravel Switch the track is down grade. At the time of the

accident, plaintiff lived in Northfork, and was familiar with the running of trains over defendant's road between these stations, as well as with defendant's track and roadbed, and the crossing where the accident occurred, and knew which one of the two roads could best be traveled with safety and convenience. There is no evidence that the county road was out of repair and unfit for travel, and the evidence being silent on that point, we assume that it was in good repair. On the 11th day of December, 1892, between one and two o'clock in the afternoon, plaintiff, Jennie Survant, with her two children, the eldest being a lad fourteen years of age, started in a buggy drawn by a mare, from Northfork to Gravel Switch over the Pipes road, to visit a relative. The day was cold, but the buggy top was thrown back. After they had passed through all the gates, with the exception perhaps of the last one, and were upon that part of the road running parallel with the track and at a distance of about 300 yards from the crossing, she stopped and looked and listened to ascertain whether or not a train was approaching, and not seeing or hearing any, and without further effort on her part so to do before reaching the crossing, the buggy was driven upon it, and then, for the first time, she saw a train rapidly approaching from the direction of Northfork and within a short distance of her. The alarm whistle was sounded, the crossing was made, but the mare got frightened and ran away, causing the buggy to strike a telegraph pole, thereby throwing its occupants out.

The train was a through freight containing about twenty cars loaded with coal. It was running between twenty and thirty miles an hour, the usual speed of such trains between these stations, because of the down grade and the grade to be climbed. There is no evidence that the mare was frightened before the crossing was reached or after she got upon it, but rather that she got frightened after the crossing was made, and while she was on this parallel road over the defendant's right of way. Nor does the evidence indicate that after the perilous condition of plaintiff was discovered by the engineer in charge of said train, he or any of the other employees thereon did that which they should not have done, or omitted to do that which they ought to have done within the line of their duty to avert the danger, if any, to the plaintiff.

The contention of appellees that the Pipes road was a public road and the crossing thereover a public crossing is not sustained

by the evidence. It was never created a public road by the County Court, or dedicated as such by any of the owners of the land over which it passes. The County Court of Marion county never at any time exercised in any way the least control over it. Pipes, the owner of the land, states that the road is a private passway; that he bought and paid for the land over which it runs and pays taxes upon it.

A public road can only be established in two ways. One is in the manner prescribed by the statute, the other dedication; and in the latter case it must be accepted by the County Court. In the case of *Wilkins v. Barnes*, 79 Ky. 323, this court said: "Both a dedication and an acceptance must concur. The former may be made by deed, or result from such use and lapse of time as would constitute a right in an individual by prescription."

And again: "A road or street dedicated to the public must be *accepted* by the County Court or town, either upon their records or by the continued use and recognition of the ground as a highway for such a length of time as would imply an acceptance. The continued use of a road by the public for fifteen years or more, with the *exercise* of power on the part of the County Court over it by appointing overseers, etc., would constitute it a highway." (See also *Gedge, etc. v. Commonwealth*, 9 Bush, 64).

This is not the case here. Besides, it is not in keeping with the intelligence and common sense of any community to assume that the people or the County Court would either construct, maintain or accept as a public road, a road only a mile in length, one-half of it being upon the land of an individual and the other half upon the right of way of defendant's railroad and parallel with its track, over which freight and passenger trains were being operated daily.

No dedication of said road or acceptance thereof by the County Court having been shown, or right by prescription in the public to use the same as a public road, all that portion of the testimony of witnesses who testified that the road was a public road and the length of time it had been used as such, and to which the defendant objected, should have been excluded from the jury on defendant's motion so to do. So that, this court holding, as it does under the evidence, that the crossing where the accident occurred was a private crossing, the question is, whether or not defendant was negligent in the running of its train along and

over said crossing at the time and in the manner complained of. We find this language in Shear. and Red. on Negligence (3d Ed.) § 478:

“Frequent attempts have been made to convict railroad companies of negligence on the mere ground of the speed at which their trains have been run. But it never has been, and we trust never will be, established as a rule of law, that any conceivable rate of speed is, *per se*, evidence of negligence. The whole object of the railroad system is to attain a high speed of travel; and the vast saving of time which the community makes by every increase in the rapidity of travel, with the corresponding increase in the productive power of nations, should make courts and juries cautious, lest they hinder the progress of the world by an unwise timidity. If the track is decayed or loosely laid, a high rate of speed is, no doubt, dangerous. There are many railroads upon which it would be more dangerous to travel thirty miles an hour than to move at double the speed over a well-built and equipped road. So when the road passes through a village, town or city, the speed of its trains should obviously be diminished in proportion to the liability of meeting persons on the track. But in crossing an ordinary rural highway no diminution of speed is required unless very special circumstances make it necessary.”

And again, in section 481: “An engineer is not bound to lower his speed on approaching the ordinary highways in the country where travelers only pass occasionally.”

And this court, in the case of *Hucker's Adm'r v. Ky. Cent. R. Co.*, 7 Ky. Law Rep. 761, held “that railroads are not required to slow up and signal at all points along their road where people are in the habit of crossing; that it is only where the way is a public one that reckless speed or the failure to signal amounts to neglect upon the part of the railroad company.”

And in the case of *Shackleford's Adm'r v. L. & N. R. Co.*, 84 Ky. 43: “Railroad trains must give the customary signals at public places or public crossings. The failure so to do is negligence. But this is required for the safety of passengers, train men and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere.”

Appellees, however, contend that it was the duty of the engineer to sound the whistle and signal the approach of the train to

Northfork, and by failure so to do she was not apprised of its coming at Pipe's crossing. Granting this to be true, and that under the evidence she had a right to rely upon and expect such signals to be given, because the proof conduces to show that she was not in fact a trespasser, but by implied permission and license of the company had the right to use the crossing and road as a neighborhood road, yet this case differs in principle from the case of *Cahill v. Cincinnati, etc., R'y Co.*, reported in 92 Ky. 345, in this: That in the *Cahill* case, the injury was caused by the railroad company, and in this case it was caused by the fright of plaintiff's mare after the crossing had been made, and after plaintiff had voluntarily placed herself in a position of danger, from which the use of ordinary care and prudence of the defendant's employees in charge of said train could not relieve her. The plaintiff states that she was looking out for trains, as it was about time for the passenger train, and if it had been the passenger she would have had time to have gotten to Gravel Switch.

While negligence, contributory negligence, and the question as to whether or not after the discovery of the danger, the defendant used ordinary care and prudence to prevent the injury, are questions of fact for the jury, yet they are all predicated upon the idea that before the plaintiff can recover, there must be evidence of some positive, actual negligence on the part of defendant, and but for which the injury would not have happened, which is not established under the evidence in this case.

Finally, as to the verdict of the jury. Plaintiff's injuries appear to have been slight; no bones were broken, and no permanent injury shown. This court, in the case of *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, held the verdict excessive, because it was not shown with reasonable certainty that there was permanent injury, the medical testimony being as unsatisfactory in that case as in the one before us.

Wherefore the judgment of the lower court is reversed, with directions to grant defendant a new trial.

TRESPASSER KILLED ON RAILROAD TRACK — LICENSE — RAILROAD COMPANY NOT LIABLE FOR PERSONAL INJURY — ADMINISTRATOR — RIGHT OF ACTION — *RES ADJUDICATA*. — In *BROWN'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.*, 97 Ky. 228 (1895), person on railroad

track run over by train, the facts as stated by GRACE, J., in the opinion rendered on the appeal by plaintiff from judgment for defendant in the Jefferson Circuit Court, are as follows:

“ The evidence discloses that this accident happened on that part of the line of defendant’s railroad in the city of Louisville running from the eastern end of the city southwardly, and westwardly to the western end of the city, and on that part of their track lying between Baxter avenue and Broadway, a distance of something like ten thousand feet, running south from Baxter avenue to Broadway. And that within this distance there are no streets or other public passways crossing defendant’s line of railway, though there are streets both east and west of same (some distance off), and running parallel with the track of defendant. It thus appears that this line of railway and roadbed, tracks and side tracks, switches, and all appliances necessary for the use of same, were the exclusive property of the defendant company, disconnected with any right of use in the public or in any individual members of the public, not a servant of the defendant corporation. It was while the decedent, Thomas Brown, was traveling along this right of way, going south from Baxter avenue to Broadway, that he was, on the 5th of November, 1891, run over and killed, in the open daylight, about three or four o’clock in the afternoon, by a freight train of the defendants being then moved along their tracks, in the same direction that plaintiff’s decedent was traveling.

“ Quite a number of witnesses introduced by plaintiff speak of this accident, under divers circumstances, and at different places, in the vicinity, most of them speaking and noting the usual signal given by the railroad in case of danger — the regular alarm signal. Those of them who speak of the near approach of the train to the deceased, fix the distance as they saw it after coming from their several positions, and after hearing the repeated alarm signals, and they differ materially as to the time that elapsed between the first signal given and the time they first obtained sight of the deceased and the approaching train. Some noticed decedent walking along this track; with his back to the approaching train, and some say that before decedent was struck they think his foot was fastened in the frog, or between the rails of some of the several switches making off from the main track. Some witnesses say they saw another person attempting to pull decedent off the track from immediately in front of the near-approaching train; other witnesses claim to have noticed a shoe worn by the decedent pulled from the frog or switch, where it was fastened. Some of the witnesses give the opinion that the train was moving at the rate of seven or eight miles an hour. The

general theory of plaintiff seems to be that decedent's foot was fastened in the frog or switch, so that he could not release same, and thus he was run over by the train.

"In all this testimony, however, we think we may say that none of the witnesses introduced by plaintiff undertook to say what had been done, or what was being done by the engineer and other employees of the railway company then operating said train to avoid any injury to deceased. No one for plaintiff professes to tell just where or when decedent came on the track, nor just where or when defendant's employees first discovered him in any dangerous or perilous position, with reference to the engine and cars of defendant.

"Plaintiff's theory, even as to how this injury occurred, as set out in his original and several amended petitions, is not very clear or well defined. In his original petition he says it was by reason of the gross and wilful negligence of the defendants in this, that they did see the perilous position of decedent in time to have avoided the injury, or that they could have seen his perilous condition by the use of ordinary diligence for this purpose, complaining that the train was a heavy one and that the speed was too great, and that the agents of defendant did not give the danger signal until it was too late to avoid the injury to decedent. And in their original petition they attribute the failure of the decedent to get off the track to the fact that his foot was fastened in a frog. By a later amendment they say they do not know whether it was a frog or a switch that decedent was fastened in. In another amendment they say the brakes used on the train were insufficient, in kind and number, and too weak, to haul the train running at the rate of speed that it was traveling at the time the injury occurred. And by a still later amendment they say that the train was imperfectly manned, and not by a sufficient number of brakemen.

"As to these several amendments and the charge made in and by them, we feel quite authorized to say that there was no evidence to show that the train was greater or heavier than trains generally transported. Nor was the speed shown to be at a dangerous rate, nor the brakes defective in any way, nor insufficient; nor that there was less than the usual number of brakemen then in position and service on the train.

"It was claimed by plaintiff that this railway track and the embankment on which some of it was built was used by the public to a considerable extent, both at that time and for a considerable time before the accident. And plaintiff says that thereby it became and was a public highway, and that defendant failed to keep a lookout for decedent or other travelers on said highway.

“ Plaintiff’s manner of interrogating the witnesses, as well as the line of argument in his brief, shows that he relies for a recovery upon these several matters of default and negligence of the railway company hereinbefore recited.

“ From the evidence we draw this conclusion, that the deceased, Thomas Brown, at the time of his death was a trespasser on the road of defendants; that he was a wrongdoer, there without right or authority.

“ We think the better doctrine is, that simple acquiescence on the part of a railroad company in the use of its track in this way does not confer authority or right, nor amount to license so to use.

“ That decedent being a trespasser and a wrongdoer at the time of his injury, had no right to complain of the size or weight of the train, nor of its speed (further than it should not be run in a city at a reckless and dangerous rate), nor of its machinery or brakes, that they were insufficient, nor that it was not properly manned.

“ All these things, so far as decedent was concerned, were purely matters within the sound discretion of the railroad company. True as to the general public at public crossings and to its own passengers the railroad company may owe all these duties, but not to plaintiff’s decedent at the time and place of the injury.

“ The doctrine as to actionable negligence is that it must be a failure to discharge some duty devolved on the railroad company to the individual entitled to the right, and not for a failure of duty to others than himself.

“ So that a trespasser and a wrongdoer cannot be heard to argue and say that the train was too heavy, or machinery insufficient, or that the train was imperfectly manned. There is this right, however, that belonged to the decedent as one of humanity, and that is, that it was the duty of the railroad company after becoming aware of his danger to use all reasonable care to avoid his injury, and this has been extended by the decisions of our court to include the duty on the part of the railroad company, its agents and employees, to keep a lookout along its line of railway, in cities where persons are likely to be found trespassing on its right of way, and this duty, so extended, is all that has been guaranteed to a trespasser and a wrongdoer. Along this line of duty imposed upon the railroad to the deceased, plaintiff’s evidence fails to show any negligence on the part of the railroad company.

“ We do not recognize the necessity of any extension of this general statement of the doctrine. We think, from a careful review of the evidence in this case, that it failed to show any such negligence on the part of the railroad company whereby decedent came to his

death. Neither the facts given in evidence by plaintiff's witnesses, nor any reasonable deduction fairly to be drawn from them, bring the case within the line of responsibility. Of course, in sustaining the court in giving a peremptory instruction to find for defendant, we base it solely on the testimony offered by the plaintiff; and while the court below declined at first to give this peremptory instruction, requiring the defendants to introduce their firemen and engineer, thinking, possibly, that might develop something in behalf of plaintiff's case, yet when they failed to do so, the court then gave the peremptory instruction.

"We think the general view of the law of the case, herein indicated, is supported by the following decisions of our own court: *L. & N. R. R. Co. v. Lyter*, 6 Ky. L. Rep. 223; *L. & N. R. R. Co. v. Howard's Adm'r*, 82 Ky. 212; *Nichol's Adm'r v. L. & N. R. R. Co.*, 9 Ky. L. Rep. 702; *Shackleford's Adm'r v. L. & N. R. R. Co.*, 84 Ky. 43; *John's Adm'r v. L. & N. R. R. Co.*, 10 Ky. L. Rep. 758; *L. & N. R. R. Co. v. Cooper's Adm'r*, 7 Ky. L. Rep. 102; *Johnson's Adm'r v. L. & N. R. R. Co.*, 91 Ky. 651; *Oatts v. C., N. O. & T. P. R. R. Co.*, 15 Ky. L. Rep. 87. Wherefore the judgment of the lower court is affirmed."

In *BROWN'S ADM'R v. L. & N. R. R. Co.* (*supra*), the court discussed the right of action of an administrator, the ruling upon this point being stated in the syllabus of the official report (97 Ky. 228) as follows: "The statute giving a right of action against a railroad company to the administrator of one who has been killed by the negligence of the company implies the right to have an administrator appointed in this State for the sole purpose of prosecuting such action, although the decedent was a resident of another State and had no personal estate in Kentucky and had no debts due him here. As the question as to whether plaintiff was a lawfully appointed administrator was made by defendant on affidavits and by preliminary motion in the court below, and was decided in favor of plaintiff, it was no longer an open issue proper to be made again in the same case between the same parties, and plaintiff was right in not accepting such issue and in introducing no evidence on same on the final trial."

PHELPS & THUM and **A. E. WILLSON** and **JACOB MERRIWETHER** appeared for appellant; **LYTTLETON COOKE**, for appellee.

KENTUCKY CENTRAL RAILWAY COMPANY v. SMITH.

Court of Appeals, Kentucky, September Term, 1892.

[Reported in 93 Ky. 449.]

RAILROAD CROSSINGS — DEGREE OF CARE REQUIRED OF RAILROAD COMPANIES. — A greater degree of care must be exercised by a railroad company when running its cars on a public street in a town or city than is required to be exercised at the ordinary crossings in the country; and when there are three railroad tracks on a principal street, constantly used, extraordinary care to avoid injury must be shown by the railroad company before it can be exempted from liability for injuring those who have the same right to use the streets that the company has.

RUNNING SWITCH AT CROSSING. — It is negligence *per se* on the part of a railroad company to use a running switch at a crossing in a populous town or city.

PUSHING CARS AT CROSSING — DUTY OF RAILROAD COMPANY. — Where cars were being pushed in front of an engine at a public crossing in a city it was negligence on the part of the railroad company not to have a brakeman or other employee on the front car to warn persons on the street of its approach.

WATCHMAN AT CROSSING. — Where a railroad crossing in a city of 30,000 people was "as much used as any other part of the city" it was negligence on the part of the railroad company not to have a switchman at the crossing.

DEGREE OF CARE REQUIRED OF CHILDREN CROSSING TRACK. — A boy, about thirteen years old, is only required to exercise that degree of care in crossing a railroad track which an ordinarily prudent child of his age would have exercised (1).

PLACE OF ACCIDENT — JURY VIEW. — Where the place of injury had been fully described by witnesses, and the jury, at the close of the testimony, was sent to view the premises, the defendant was not prejudiced by the refusal of the court to send the jury to view the premises at a particular time during the trial before the testimony closed.

1. *Boy killed by engine in railroad yard*
— *Trespasser — Right to dismiss action — Practice* — In *VERTREES' ADM'R v. NEWPORT NEWS, ETC., R. R. CO.*, 95 Ky. 315 (1894), the question decided was as to the right of plaintiff to dismiss his action at a certain time during the trial, defendant having moved the court, at conclusion of plaintiff's evidence, to instruct peremptory finding for defendant to which plaintiff excepted and moved the court to allow him to dismiss action without prejudice to a

future trial, which was overruled. On appeal it was held that plaintiff had a right to dismiss action, and trial court erred in overruling his motion, and judgment was reversed. The facts of the case as stated by LEWIS, J., were as follows: "Plaintiff's intestate was a boy about ten years of age, and was killed in the following manner: The engineer had just made what is called a running switch, whereby two freight cars were detached from the train and placed upon a side track. And the

APPEAL from Kenton Circuit Court. The facts appear in the opinion. *Judgment affirmed.*

HALLAM & MYERS and GEO. C. LOCKHART, for appellant.

O'HARA & BRYAN, for appellee.

Pryor, J. — At the September term, 1890, of the Kenton Circuit Court, the appellee recovered a judgment based on a verdict of \$15,000 for damages on account of personal injuries sustained by him, and caused, as alleged, by the negligence of the appellant, the Kentucky Central Railway Company. The appellee, on the 7th of August, 1889, at the instance of Mrs. Spotts, who lived at Eighth and Washington streets in the city of Covington, had gone to purchase bread at the grocery of one Linn, located at the southwest corner of Ninth and Washington streets. Where Ninth street intersects Washington street there are three separate railway tracks laid on the last-named street. One of the tracks belonged to the Chesapeake & Ohio road, and the two remaining tracks to the appellant, lying west of the Chesapeake & Ohio track. The appellant had a switch on its tracks, the south end of it being, as the proof shows, about 100 feet from Ninth street. At the time of the injury, the appellee (a boy) was about thirteen years of age, and was temporarily

engine and tender were moving back slowly upon the main track to reach other cars of the train that had been left upon the main track beyond junction with the side track, when deceased, of his accord, ran from the depot, passing across a pond of water frozen over, to the locomotive and tender, and passing around the latter, attempted to get upon break-beam of the engine, but slipped or made a misstep, and falling upon the track and being run on was killed. The place was within the private yard of defendant, where deceased had no right to go, and defendant's servants were not required to anticipate or look out for his presence. So, deceased being at the time a trespasser, and his conduct, under the circumstances, extremely incautious and reckless, there would be no ground whatever for holding defendant responsible for his death, unless it be made to appear that the

engineer discovered his peril in time to avoid running the engine and tender on him. But there is no evidence before us tending to establish that fact, or negligence of any kind or degree on part of those in charge of the engine and tender. Consequently, as the record now stands, the lower court was in our opinion bound to give the peremptory instruction. Whether it was error to overrule plaintiff's motion to dismiss the action without prejudice, notwithstanding failure to make out his cause of action, depends upon meaning of subsection 1, section 371, Civil Code, which provides that an action, or any cause of action, may be dismissed, without prejudice to a future action, 'by the plaintiff before final submission of the case to the jury, or to the court, if the trial be by the court.' " *Held*, error to overrule plaintiff's motion to dismiss.

residing with his uncle, Dr. Kearns, and, after he had purchased the bread, in order to reach his uncle's house, or that of Mrs. Spotts, who had sent him on the errand, he had to cross Washington street. The Chesapeake & Ohio track was west of the tracks of the appellant, and after he had crossed the Chesapeake & Ohio track, while standing between that track and the tracks of the appellant, he was struck by the cars of the appellant, knocked down, and both legs mashed to a pulp from the feet beyond each knee. Surgeons were at once sent for, and both legs amputated above the knee. It is shown by the testimony, and in no wise contradicted, that the place where the injury occurred on these two streets is in the central part of the city with regard to population, and was used and passed over by its citizens as much as any of the other streets. Both the appellee and the appellant had the right to the use of the street, with the duty on the part of the appellee to exercise such ordinary care and caution as pertains to one of his age to avoid coming in contact with the cars, and on the part of the railway company to use the highest degree of care in order to prevent injuring those who were using the street in passing either on foot or in vehicles. Such a high degree of care must necessarily attach to every railway company when operating its cars on the streets of a densely populated city, and when the travel otherwise than on the cars of the company is as constant as is usual on such streets. The character of the highway, and the travel upon it, often determine the degree of care to be exercised by both the company and the party injured. A greater degree of care must be exercised by the company when running its cars on a public street than is required to be exercised at the ordinary crossings in the country, and when there are three railroad tracks on a principal street, constantly used, as is shown in this case, extraordinary care must be shown on the part of the railroad company before it can be exempted from liability for injuring those who have the same right to use the streets that the company has. It is true the party injured may be guilty of such contributory neglect as to prevent a recovery, and his failure to exercise such care as an ordinarily prudent man would exercise, under the circumstances, may often be interposed as a defense. Whether any such defense existed in this case will be first considered. The train of the appellant was made up of the engine and six cars. The train or engine was running backwards, and was pushing, in advance of

it, two gondola cars, and pulling four box cars. The train was going north, and the purpose was to make a running switch; that is, they were to place the four box cars on another track, without stopping the engine or train. While the train was in fact going north, the head of the engine, or the front part, was south. There were on the train, at the time of the accident, five employees. The engineer and fireman were in the cab of the engine. O'Donnell, the fireman, was on the front part of the engine—that is, between the engine and the box cars that the engine was pulling—and was there for the purpose of separating the box cars from the engine when the signal was given. One of the brakemen was on top of the box cars, and another brakeman setting the switch, or preparing to do so. There was no one on either of the gondola cars that were being pushed north to give warning to those on the street, or those crossing it, of the train's approach, and no watchman stationed at the crossing for that purpose. We shall assume that the bell was ringing to give notice to the passengers of the train's approach. The employees on the train so state, and there is no reason for discrediting them. When the time arrived for detaching the box cars the signal was given, and the engine, as the testimony conduces to show, increased its speed to get out of the way of the detached cars; and the boy, being alarmed by the cry of some one as to his danger, stepped back near the track of the appellant, was struck by the car in front that was being pushed north, and mangled as already stated.

He had crossed the Chesapeake & Ohio track on his way with his bread, and while standing at or near the place of the injury a train passed south on the track he had the moment before crossed; so there was a train going south that he had managed to escape, and one backing north at the same time, but on a different track, that inflicted the injury; and it seems to us it would be difficult for one more prudent and careful, by reason of his advanced years, to have heard the ringing of a bell with these trains under headway, or to have discovered that the engine fronting the south was really going north, and pushing the gondolas before it. It is said that the little fellow was picking up pebbles from the street, and examining them, and perhaps he was; but that his life was in peril from the time he undertook to cross the track of these roads is manifest, and one of mature years would probably have met with the same fate; but, whether

so or not, if there had been a watchman at the crossing, or even a brakeman on the far end of the gondola, that was at least sixty feet from the engine, this accident would have been avoided. It is true the employees, when they discovered the danger, used every effort within their power to avoid the injury, even to the sacrifice of their own lives; and it may be said that the company, by reason of its neglect in not having watchmen at these crossings, or in making running or flying switches in the streets of a densely populated city, is the cause of this injury, and not those who perhaps exercised all the caution they could exercise with the employees assigned to this train.

It is an improper use of the streets of a city to so use them by railroad tracks and trains as to prevent the use of the streets for ordinary business purposes, or to use the streets for the purpose of making wild switching, that must necessarily endanger the lives of those who are compelled to cross or use them. The elementary books establish the doctrine that it is negligence *per se* on the part of a railroad company to use a running switch in a populous town or city. "The construction and use of a running switch on a highway in the midst of a populous town or village, is of itself an act of gross and criminal negligence on the part of the company." Shear. & R. Neg. (3d Ed.), § 446; Ky. & Ind. Bridge Co. *v.* Krieger, 93 Ky. 243. In the case of Illinois Cent. R. Co. *v.* Baches, reported in 55 Ill. 379, it was held that when a running or flying switch was used in a populous part of a city of ten or twelve thousand inhabitants, at a crossing or along an alley used by the public and the cars thrown upon the side track having a momentum of five miles an hour, from which an injury occurred, the company was guilty of a high degree of negligence, and the fact that signals of alarm were given from the engine employed in the switching, intended for those crossing the track, afforded no excuse. In this case the engine, with the cars attached, caused the injury, and the decided weight of the testimony is that it resulted in the effort to avoid the detached cars, and to make the switching successful. The momentum of the engine, as shown by the plaintiff's testimony, after it was detached, was eight or ten miles an hour, and from that of the defendant five or six miles an hour; the witnesses for the latter stating that the speed slightly increased when the signal was given. Here, then, was the highest degree of neglect on the part of the company, and ordinary neglect on the part of the injured

boy; the one scarcely in a condition to judge of his danger, and the other not even exercising ordinary care, when from the facts the highest degree of care was required. If railroad companies are permitted to use the streets of a town or city, others, who have the right to use them, can require that the utmost care shall be used to secure the safety of these persons. This degree of care is rendered necessary by reason of the danger to which persons are exposed who are compelled to use the streets in common with the railway companies. This rule does not dispense with the duty on the part of one crossing or using the street to use ordinary care and prudence for his own safety, and if he fail to do this, and is guilty of gross neglect as well as the party injuring him, and but for which the accident would not have happened, he cannot recover. *Ferguson v. Wis. Cent. R. Co.*, 63 Wis. 145. We have been referred to no authority by counsel in which a recovery has been denied upon such a state of case as this, or in cases where the facts conduce to show such grave neglect on the part of the company. The neglect consists — First, in the company making flying switches in the street; second, in not having a brakeman or some other employee on the front gondola; and lastly, in not having a switchman at a crossing, to use the language of a witness, used as much by the people in passing “as any other part of the city,” with a population of 30,000.

It is contended by counsel for the appellee that the instructions form no part of the record. After the verdict, a motion for a new trial was made within three days, as provided by section 342, Code. That motion was heard and overruled by the court. The appellant then moved to set aside the order overruling the motion to enable it to file other grounds, and that motion prevailed over the objections of counsel for the appellee. Section 343, Code, provides that the motion must be by written grounds filed at the time of making the motion; and section 342 provides that it must be done within three days after the verdict, unless unavoidably prevented, making as an exception the cause mentioned in subsection 7 of section 340. By an amendment, when there is a *special verdict*, the grounds must be filed within three days after the judgment on the special finding. The object of requiring the motion to be made within three days is to enable the court to render a judgment without delay, and when the facts and questions of law are fresh in the minds of court and

counsel, and it is the evident meaning and purpose of the Code to close the doors to any motion for a new trial upon any other grounds than the exceptions made, unless unavoidably prevented. Such too, is a safe construction of this provision of the Code; for, if motions are permitted to be renewed from day to day during the term, the time of the court would be consumed in hearing motions for new trials, for amendments would likely be allowed whenever the minds of counsel suggested some additional reason for another hearing. This court, in *Houston v. Kidwell*, reported in 83 Ky. 301, adjudges that additional grounds might be filed after the three days, but was careful to say that such additional grounds must be filed *before the motion for a new trial was disposed of*, and that construction was given with some doubt. It is true the court may, as a general rule, set aside orders made during the same term at which they were entered, and under this well-recognized rule of practice may set aside the order refusing a new trial, and grant one; but to permit counsel, after the motion has been overruled, to file other grounds, is in violation of the spirit and meaning of the Code. Counsel realized, doubtless, that the instructions given by the court were more favorable to the appellant than the law authorized, as the employees were confined to the exercise of ordinary care, and required only to give warning of the train's approach by bell or whistle when needed, and, if shown to have been given, would have exempted the company from responsibility. The court also, in effect, said to the jury that if the appellee was guilty of negligence he could not recover, if but for the negligence the injury would not have been sustained, unless the appellant became aware of the danger, and the exercise of ordinary care would have avoided the injury. This boy was only required to exercise that degree of care which an ordinarily prudent child of his age would have exercised, and, if he exposed himself to danger in such a manner as that the injury could not be avoided by the defendant by the exercise of proper care to prevent it, no recovery should be had; but if the child was on the street or crossing where it had the right to be, and was injured by reason of the gross neglect of the defendant, although guilty himself of ordinary neglect looking to one of his age, a recovery must necessarily follow. So the instructions could not be complained of, if in the record.

There were some objections made to the action of the court during the progress of the trial that will not be considered, as

there was no abuse of discretion and no harm resulting from such action. The appellant offered to prove by a witness that, at the time the legs of the appellee were amputated, Dr. Kearns, the uncle of the plaintiff, said: "He had often warned plaintiff to quit playing on the railway tracks at the place where the accident happened." This offer was refused for two reasons: Dr. Kearns could himself have testified, and, besides, it was incompetent. The boy was then under the influence of morphine, and, if not, it was incompetent, as it could not have affected the result, and in no wise lessened the care to be exercised by the appellant, or increased that to be exercised by the appellee. A witness was asked, on cross-examination by defendant's counsel, if he did not then have a controversy with the defendant, or was hostile to it; and, when re-examined by the plaintiff's counsel, was asked if he had not recovered a judgment for \$12,500. The question was objected to, and the court refused to allow the witness to answer, and thereupon counsel for the defense moved to set aside the swearing of the jury, and the motion was overruled. The court, it seems to us, fully protected the rights of the defense in requiring the witness not to answer.

There was an objection and an exception taken to the action of the court in refusing to send the jury to view the premises at a particular time during the trial, and before the testimony closed. The court refused to do this, but at the close of the testimony sent the jury to view the premises. The place of the injury had been fully described by the witnesses. No misconduct is alleged to have taken place on the part of the jury (1). Facts constituting the neglect have been clearly established, and we perceive no reason for reversing the cause on that ground. Some affidavits were filed showing the importance of other testimony discovered after the trial had closed; and it appearing that these witnesses had been previously summoned, except one who was an employee of the company, and the court refused to open the case, there was no error in this regard.

The judgment is affirmed.

1. See also, on the question of jury Schick, 94 Ky. 191, reported page 590, view, *Louis. & Nash. R. R. Co. v. ante.*

PASSAMANECK'S ADM'R v. LOUISVILLE RAILWAY COMPANY.

Court of Appeals, Kentucky, September Term, 1895.

[Reported in 98 Ky. 195.]

CONTRIBUTORY NEGLIGENCE — PLEADING — STATUTE. — The right to plead contributory negligence as a defense to an action to recover damages for the death of a person by the negligence or unlawful act of the defendant was not taken away by section 241 of the new Constitution.

CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — Contributory negligence is a matter of law and of fact, and whenever there is any doubt as to the facts, or whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is a question for the jury.

CHILD KILLED BY BEING RUN OVER BY STREET CAR — PARENTS' NEGLIGENCE — QUESTION FOR JURY. — Where a child sixteen months old, in the custody of an eleven-year-old sister, being temporarily left by the sister upon the front steps of their home near a street railway, strayed upon the track and was killed by a passing car, it was error to instruct the jury, in an action by the father as administrator against the street railway company to recover for the death, that the parents were guilty of contributory negligence, as the jury should have been permitted to determine the question (1).

CONTRIBUTORY NEGLIGENCE OF CHILD. — A child sixteen months old is incapable of exercising any judgment or discretion, and is, therefore, not chargeable with contributory negligence.

CONTRIBUTORY NEGLIGENCE OF PARENTS. — If the driver of the car could have discovered the presence of the child on the track by proper care and diligence in time to have avoided the injury, it was his duty to do so; and if he failed to do this, then the contributory negligence of the parents, if they were guilty of any, was canceled by the negligence of defendant's servant (2).

CARE REQUIRED TO PREVENT INJURY TO CHILDREN. — A greater degree of vigilance and caution must be observed in controlling the movements of street cars to prevent injuries to children than is required for the safety of adults not laboring under disabilities.

APPEAL from Jefferson Circuit Court. The facts appear in the opinion. *Judgment reversed.*

ABBOTT & RUTLEDGE and LIEBER & LINCOLN, for appellant.
HUMPHREY & DAVIE, for appellee.

1. See Ky. Cent. R'y Co. v. Smith, volume, relating to Accidents to Children on Railroad Track.
93 Ky. 449, preceding case reported, and the several Kansas cases reported herein, together with the decisions of the several States reported in this

2. See NOTE ON IMPUTED NEGLIGENCE in this volume, pages 151-156, *ante*.

Paynter, J. — On the 6th of August, 1893, at half-past seven o'clock P. M., Mary Passamaneck, an infant of sixteen months old, was run over and killed by a street car, drawn by two mules, on the appellee's street railroad in the city of Louisville. Her father, Moses Passamaneck, qualified as her administrator, and brought this action to recover damages, alleging that the agent and servant of appellee negligently and carelessly drove its mules and ran its car over the child, inflicting injuries from which it died within a few minutes thereafter. Appellee denied the injuries were inflicted by the carelessness or negligence of its agent or servant, and pleaded that they resulted from decedent's own want of care and by her negligence, and by the negligence and want of care of the plaintiff. The verdict of the jury was for the appellee.

The occurrence, which resulted in the injury and death of the child, took place in front of the residence of appellant, on Main street, in the city of Louisville, between Floyd and Brook streets. Main street runs east and west, Floyd and Brook, north and south. The car line is on Main and the car which inflicted the injury was going west. Moses Passamaneck lived with his family on the north side of Main street, between Brook and Floyd streets. A short time before decedent was injured, at a point between Brook and Floyd, on Main street, a man was injured by coming in contact with a large dog. In consequence quite a crowd assembled at the place of the accident. An eleven-year-old sister joined the crowd, with the decedent in her arms, but the sister carried her back to the step of the father's residence. The sister then walked again towards the crowd. Then the decedent got down and walked out into the street, where she was injured. It does not appear what time elapsed from the time the child was placed on the step until she was injured, but we conclude from the circumstances it must have occurred about as soon as the child could reach the street-car track, a little distance in front of the car which ran over her.

The track was straight and nothing to obstruct it from the view of the river. It was getting dark, as some witnesses expressed it, and as others said, it was dark. Some of the witnesses testify that they could tell it was a child on the track from the sidewalk, about eighty feet away; and as many as two witnesses, one called by the appellant and the other by the appellee, could see the child in the street from their windows. One of them hallooed to the driver to attract his attention and save the child. The

driver testified that he was looking ahead along the tracks when the accident occurred, while several witnesses testified that he had his head turned in the direction of the crowd which had assembled to see the injured man.

The driver testified that he did not see the child until the mules were about on it and shied around it, when he put down his snow plow and put his brakes on and did all he could to prevent running over the object which he could not then distinguish, but which proved to be the child. Others testified that he did not put on brakes until the front wheels had passed over the child. The appellant was a tailor, and had, about four o'clock on that (Sunday) evening, gone to call on a neighbor, where he was when the accident occurred.

Thus the case stood. Numerous instructions were offered on each side. The court overruled all that were asked, but prepared and gave instructions to the jury, among others the following:

"The court instructs the jury that, unless they believe from the evidence that the death of the plaintiff's decedent, Mary Passamaneck, was caused by the negligence of the defendant's agent or employee in charge of the street car on the occasion of the accident, the law is for the defendant, and the jury should so find. The court instructs the jury, as a matter of law, that it was negligence on the part of the nurse to permit the child to be on the street-car track at the time and place of the accident, and this negligence on the part of the nurse the law imputes to the father, the plaintiff in this case, and bars his action, unless the jury shall believe from the evidence that the driver of the defendant's car discovered the child upon the track, or, by the exercise of ordinary care, could have so discovered the child upon the track in time to have prevented the injury, in which last event the law would be for the plaintiff, and the jury should so find."

It is insisted the court erred in giving this instruction to the jury, first, because section 241 of the Constitution was intended to and does make the plea of contributory negligence no longer available as a defense to an action to recover damages for the death of a person which resulted from an injury inflicted by negligence or wrongful act. If this is not correct, then it was erroneous for the court to tell the jury, as a matter of law, that it was negligence on the part of the nurse to permit the child to be on the street-car track at the time and place of the accident, and that such negligence on the part of the nurse, the law imputed to the father, the plaintiff in the case, and barred his action.

If this position of counsel be correct in the first instance, then it was erroneous for the court to instruct on the question of contributory negligence.

At the time of the adoption of the Constitution there were two provisions of the statute which related to death by wrongful act. Section 1, chapter 57, General Statutes, gave a cause of action to the personal representative of one, not in the employment of the railroad company, who lost his life in this commonwealth by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness, negligence or carelessness of their servants or agents. This right to recover was given the personal representative for the injury resulting in death, when the facts would have entitled the person himself to recover for an injury where death did not ensue.

Section 3, chapter 57, General Statutes, gave a right of action to the widow, heir or personal representative of the deceased in cases where the death resulted from the wilful neglect of any person or persons, company or companies, corporation or corporations, their agent or servants, and to recover punitive damages for the loss of the life resulting from wilful neglect.

This court had held, in *Henderson's Adm'r v. Ky. Central R. Co.*, 86 Ky. 389, and *Jordan's Adm'r v. Cincinnati, etc., Ry. Co.*, 89 Ky. 40, that the word "heir," as used in this statute, meant "child." It was also decided by this court that, when the deceased left neither widow nor child, no action could be maintained under section 3.

Just before the adoption of the section in question, it appears from the debates in the constitutional convention, a learned judge in this State had held that section 1 was unconstitutional because it applied alone to corporations. It was given as a reason for adopting section 241 of the Constitution, in the discussion which took place concerning it, that this court had decided that, where there was no widow or heir surviving the deceased, who had been killed by wilful negligence, his personal representative could not maintain the action. To meet this constitutional objection raised to section 1, and the interpretation which this court had given section 3, were the reasons which influenced the constitutional convention to adopt the section in question.

The question of contributory negligence was not mentioned in the discussion of the section in the convention, much less any suggestion being made that its purpose in part, was to bar a

defendant's right to plead contributory negligence. The whole purpose of the section was to give the right of action to some one where a life was lost by the negligence or wrongful act of any person or persons, company or companies, corporation or corporations. Until such time as the General Assembly should provide how the recovery should go, the action to recover such damages should be prosecuted by the personal representative of the deceased person.

It left the General Assembly free to provide by law, when death resulted by negligence or wrongful act, the cases where the recovery should be compensatory damages and where punitive damages would be authorized, and to whom the recovery should go.

It was the purpose of the constitutional convention that the General Assembly should never be able to deprive the representative of a decedent, whose life was lost by negligence or wrongful act, of the right to recover damages against the wrongdoer; hence the right to sue was given the personal representative of decedent until such time as the General Assembly should provide to whom the recovery should go.

It was not the design of the convention to deprive a defendant of the right, as it then existed, to plead and prove contributory negligence. The mere fact that the constitutional provision did not follow the exact language of the statutes in force at the time of its adoption does not indicate that any right of defense was to be cut off, except that which was expressed or implied in the language used. The language used does not, in terms, state, nor can it be implied from it, that it was the purpose of the constitutional convention to destroy the right to rely upon contributory negligence as a defense.

The instruction told the jury, as a matter of law, that it was negligence on the part of the nurse to permit the child to be on the street-car track at the time and place of the accident, and that such negligence was imputed to the father. Contributory negligence is a matter of law and of fact. A child of sixteen months of age being upon the street-car track might be the result of negligence of its parents or custodian, or it might not be, depending upon the facts and circumstances surrounding its being there.

The child appeared to be in the custody of an eleven-year-old sister. The house in which plaintiff lived was more than eighty

feet to the street-car track. It was in August and, presumably, the weather was warm. It appears that the sister left her on the front steps, and, in the "caprice of childhood," she ran into the street and on the street-car track and received the injury immediately thereafter.

Negligence is a want of that reasonable care which would be exercised by a person of ordinary prudence, under all the circumstances, in view of the probable danger of injury.

"In general, it cannot be doubted that the question of negligence is a question fact and not of law. Whenever there is any doubt as to the facts, it is the province of the jury to determine the question; or whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is likewise a question for the jury. It belongs to the jury, not only to weigh the evidence and to find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts." Beach on Contributory Negligence, § 163.

Parents should use ordinary care in guarding their children, but, in determining the question of negligence, the condition of the family, the season of the year, the place of accident and the probability that it would happen, are facts to be considered by the jury; hence a child sixteen months old might be upon the street-car track and the parents not be guilty of culpable negligence.

The jury should be permitted to determine the question of contributory negligence. (*Schmidt v. Milwaukee & St. Paul Ry. Co.*, 23 Wis. 186; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 322; *Frick v. St. Louis, Kansas City & Northern Ry. Co.*, 75 Mo. 595).

In *Smith v. Atchison, Topeka & Santa Fe R. R. Co.*, 25 Kan. 738 (1), the child, two years old, strayed away from home without the knowledge or consent of its parents, went on the railroad track three minutes after leaving home, and was run over, and the court said it was not, *per se*, culpable negligence, contributing to the injury, and that the question should have been submitted to the jury.

The cases of *Payne v. Humeston & Shenandoah Ry. Co.*, 70 Iowa, 584; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; *Marsland v. Murray*, 148 Mass. 91; *Bliss' Adm'r v. Inhabitants of South Hadley*, 145 Mass. 91, are in accord with the view

1. The Smith case is reported in this volume, page 575, *ante*.

expressed that the question of contributory negligence should be submitted to the jury.

In *Shearman & Redfield on the Law of Negligence*, § 114, it is said: "The rule as to what evidence will suffice to go to the jury on the question of contributory negligence as a question of fact is substantially the same as that which governs the submission to the jury of the defendant's negligence. * * * It is a general rule, applicable in all courts, that the question is to be submitted to the jury not only where there is sufficient testimony as to the actual facts to leave a reasonable doubt, but also where the inference which might be fairly drawn from the facts is not certain and invariable and might be differently made by different minds. The court is not at liberty to withhold the question from the jury simply because it is fully convinced that a certain inference should be drawn so long as persons of fair and sound minds might possibly come to a different conclusion."

It seems not improper to say, in this connection, that a child of such tender years as was plaintiff's intestate was incapable of exercising any judgment or discretion, and is not chargeable with contributory negligence. So the inquiry as to contributory negligence must be confined to the acts or omissions, etc., of its parents.

The question is not before the court and not decided whether, in an action by a child, who was not *sui juris*, to recover damages for injuries received by the negligence or wrongful act of another, it would be proper to impute the negligence of the parent to the child.

Persons operating street cars along the public streets of a city must know, and in law are bound to know, that men, women and children have an equal right to the use of the highway and will be upon it.

It was the duty of appellee's servant or agent to be on the lookout and to take all reasonable measures to avoid injuries to persons who might be upon the street. To be on the watch is no more than ordinary care under such circumstances.

If the driver of the car could have discovered the presence of the child on the track, by proper care and diligence, in time to have avoided the injury, it was his duty to do so. If he failed to do this, the contributory negligence of the parents, if they were guilty of any, was canceled by the negligence of appellee's servant.

A greater degree of vigilance and caution must be observed in controlling the movements of street cars, to prevent injuries to children, than is required for the safety of adults not laboring under disabilities. (Booth on Street Railways, § 310.) Other authorities could be cited upon this question.

Wherefore, the judgment is reversed, with directions that further proceedings be had consistent with this opinion.

NOTES AND ABSTRACTS OF KENTUCKY CASES RELATING TO COLLISIONS AND CROSSINGS AND ACCIDENTS ON TRACK.

Among other Kentucky cases arising out of Accidents at Crossings, etc., are the following:

PASSENGER INJURED IN COLLISION — EXCESSIVE DAMAGES. — In **LOUISVILLE SOUTHERN R. R. CO. v. MINOGUE**, 90 Ky. 369 (1890), passenger injured in collision between construction train and passenger train, judgment for plaintiff in the Shelby Circuit Court for \$10,000 damages, was reversed for excessive award of damages. The syllabus of the official report states the case as follows:

“Whether the defendant was guilty of gross negligence was a question for the jury.

“Where a verdict for either compensatory or punitive damages, or both, is for so large an amount, that it can be accounted for only upon the theory that it is the result of an improper sympathy or unreasonable prejudice, it should be set aside as excessive.

“In this action against a railroad company by a passenger to recover for injuries received through the alleged gross neglect of defendant, it appears that the plaintiff sustained external bruises, and her nervous system was greatly shocked. She was confined to her bed seven or eight weeks, and since she left her bed has been unable to do any work. The accident occurred in October, and the case was tried in the following March. Physicians testify that plaintiff may entirely recover and that she may not. *Held*, that as there was no bad motive or purpose to injure, and the neglect was not so wanton as to demand the severest punishment, a verdict for \$10,000 should be set aside as excessive.

“The future effect of an injury should be shown with reasonable certainty to authorize damages upon the score of permanent injury. A mere conjecture, or even a probability, does not warrant the giving of damages for future disability which may never be realized.

“Railroad companies, as to their passengers, should be held to

the exercise of the utmost care and skill which prudent persons would be likely to exercise as to themselves, under the like circumstances, and in the conduct of a business so hazardous as railroad-ing." Opinion by HOLT, CH. J. THOMAS W. BULLITT and L. C. WILLIS, appeared for appellant; G. G. GILBERT, R. C. DAVIS and MATT O'DOHERTY, and PRYOR J. FOREE, of counsel, for appellee.

When damages not excessive. — See LOUIS. & NASH. R. R. Co. v. BROOKS, 83 Ky. 137; LOUIS. & NASH. R. R. Co. v. MOORE, 83 Ky. 678; Ky. CENT. RY. Co. v. MCMURTRY, 3 Ky. Law Rep. 625.

Passengers injured or killed in collision. — See Cincinnati, etc., R. Co. v. Privitt's Adm'r, 92 Ky. 223 (1891); Louis. & Nash. R. R. Co. v. Bell, 100 Ky. 203 (1896); Louis. & Nash. R. R. Co. v. Pott's Adm'r, 15 Ky. L. Rep. 344; Shelley's Adm'r v. R'y Co., 8 Ky. L. Rep. 928; Earl's Adm'r v. L. & N. R'y Co., 15 Ky. L. Rep. 187.

DRIVING ACROSS TRACK — OBSTRUCTED VIEW — CONTRIBUTORY NEGLIGENCE FOR JURY — FLAGMAN AT CROSSING — DUTY OF RAILROAD COMPANY. — In NEWPORT NEWS & MISSISSIPPI VALLEY COMPANY v. STUART'S ADM'R; SAME v. STUART (two cases); and SAME v. WYATT, 99 Ky. 496 (1896), appeal from judgments in the Graves Court of Common Pleas, recovered in separate suits against the railway company, judgment in each of the cases was affirmed. It appeared that "W. H. Stuart, Charles Stuart, Zephyr Wyatt and Robert Stuart attempted to cross the railroad track in a wagon, and a collision occurred between the wagon and a locomotive, resulting in the instant death of Robert Stuart and the injury of the others. Four actions were brought against the railroad company, in which it was charged that the collision was the result of the appellant's [railway company] negligence. One of the actions was by the personal representatives of Robert Stuart, and one by each of the other persons injured. The defense in each case was a denial of negligence, and a plea of contributory negligence on the part of the injured parties." The pleadings, evidence and rulings in each case being substantially the same, were disposed of in one opinion (per GUFFY, J.). The syllabus of the official report is as follows:

"In an action for damages against a railroad company, charging negligence as the cause of a collision at a crossing, and in which contributory negligence was pleaded as a defense, it appearing that by reason of the conformation of the surrounding country travelers upon the highway approaching the crossing could not see a train coming until within twelve or fifteen feet of the crossing, but that the engineer and fireman on the train could have seen the danger

in time to have stopped the train or so checked its speed as to have avoided the collision, and there being evidence that the whistle was not blown in time to have warned persons on the highway approaching the crossing, a motion for a peremptory instruction was properly overruled.

"An instruction submitting to the jury the question as to the intelligence of an infant killed in the collision, could not have been prejudicial to the defendant, because the plaintiff's evidence showed that he was a remarkably bright and intelligent boy.

"When a crossing is near a populous town, and must be crossed by a large number of people going to and from the town, both on horseback and in vehicles, and the conformation of the surrounding country is such that one cannot see trains approaching from one direction until within fifteen or twenty feet of the track, and when under certain conditions, which are not infrequent, the approach of the train or its whistle cannot be heard, the railroad company should be required to have a flagman at that point to warn travelers of approaching trains, or to adopt and use some other reasonably safe mode of warning them." Judgments affirmed. SMITH, ROBBINS & THOMAS and P. H. DARBY, appeared for appellant; R. O. HESTER, H. J. MOORMAN and W. H. HESTER, for appellees.

PERSON RIDING IN VEHICLE INJURED IN COLLISION AT CROSSING — SIGNAL — EVIDENCE — CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE. — In CAHILL v. CINCINNATI, ETC., R'Y CO., 92 Ky. 345 (1891), person riding in buggy injured at railroad crossing; judgment of nonsuit in Kenyon Circuit Court was reversed. It was held that "the failure of a person to look along a railroad before attempting to cross it is not negligence, if there is sufficient evidence, without that precaution to satisfy a person of ordinary carefulness that the track is clear — as when one knows it is not usual train-time and he does not hear the usual signal." *Held*, also, (as per syllabus of official report) that "it was error to refuse to permit one who was in a buggy behind that in which plaintiff was traveling to testify that he at a point 100 feet from the crossing looked along the railroad in the direction of the approaching train and could not see the train, as this testimony tended to show that when the buggy in which the plaintiff was traveling was within seventy feet of the crossing the train, not yet in sight, must have been more than 1,200 feet away, that being the distance at which a train could be seen, and therefore if running at the usual speed, would probably not have struck the buggy. Even if plaintiff was guilty of negligence, yet, considering

the long distance at which the buggy could be seen, the question ought to have been submitted to the jury whether those in charge of the train did or could, by reasonable diligence, have discovered the danger of a collision in time to prevent it by checking the train or blowing the whistle." *Held*, also, that "the contributory negligence of the driver of a vehicle cannot be imputed to one who is traveling in the vehicle with him by his invitation. To render one liable for the negligence of the driver of a vehicle in which he is traveling either the relation of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise whereby responsibility for each other's acts exist." Opinion by LEWIS, J. WILLIAM GOEBEL, appeared for appellant; C. B. SIMRALL and SIMRALL & MACK (of counsel), for appellee.

HORSE FRIGHTENED AT CROSSING BY NOISE OF TRAIN — RIDER INJURED — OBSTRUCTED VIEW OF TRACK — FAILURE TO SIGNAL — RAILROAD LIABLE. — In ILLINOIS CENTRAL R. R. CO. v. MIZELL, 100 Ky. 235 (1896), accident at crossing, judgment for plaintiff in the Hickman Circuit Court for \$2,000 was affirmed. The syllabus of the official report states the case as follows: "Where, at the intersection of a railroad and a highway, they both pass through cuts whereby one on the highway is prevented from seeing an approaching train until he is within a few feet of the rails, and by reason of a failure upon the part of those in charge of the engine to blow the whistle, he goes upon the track, and his horse is there frightened by the approaching train, and throws and injures him, the failure to blow the whistle is the proximate cause of the injury and the damage followed as a continuous and natural sequence from the negligent act, and was a result which might have been foreseen and expected. The fact that one approaching such a crossing did not come to a full stop to listen for the train but merely brought his horse to a slow walk in order to listen was not, *per se*, contributory negligence." Opinion by DU RELLE, J. WILLIAM H. GREEN and GEORGE L. HUSBANDS, appeared for appellant; J. M. BRUMMAL & SON and W. G. BULLITT, for appellee.

HORSE FRIGHTENED BY NOISE OF TRAIN — CONTRIBUTORY NEGLIGENCE OF RIDER. — RUPARD v. CHESAPEAKE & OHIO R. R. CO., 88 Ky. 280 (1889), person riding horseback injured by horse becoming frightened by noise of train passing over trestle crossing public highway; failure of equestrian to look for approaching train contributory negligence, and peremptory instruction to find for railroad company proper; judgment for defendant affirmed.

PERSONS INJURED ON TRACK — TRESPASSERS — DUTY OF RAILROAD COMPANY. — In LOUISVILLE & NASHVILLE R. R. CO. v. COLEMAN'S ADM'R, 86 Ky. 556 (1888), person on track killed by train, judgment for plaintiff for \$3,000 in Warren Circuit Court was affirmed. The syllabus states the case as follows:

"While a railroad company is under no legal obligation to look out for trespassers on its track, nor to anticipate their presence there, yet, when servants of the company, in charge of a train, discover that a trespasser on the track has placed himself in peril, it is their duty to use all reasonable means at their command to save his life, and the company is liable for their failure to do so. In this case the engineer of a train on the main track, seeing the danger of a trespasser on the side track by reason of the approach of a detached flat car, blew his alarm whistle and called to the man on the side track in a loud voice to get off the track, but his warning was not heeded. Thereupon the conductor, who was on the rear end of the detached car, standing at the brake, ran to the front end of the car and called in a loud voice to the man to get off the track, but the deceased, failing to heed the call, which he doubtless did not hear by reason of the noise at the time, was struck by the car before the conductor could get back to the brake, and died from the injuries received. *Held*, that there was sufficient evidence to justify the jury in concluding that the conductor was guilty of ordinary negligence in not at once putting on the brakes when he saw that the deceased did not heed the engineer's warning."

There were three jury trials of the COLEMAN case, (*supra*); the first resulted in a hung jury, the second resulted in a verdict for plaintiff for \$4,500, which was set aside by the trial court and new trial awarded, and the third resulted in a verdict for plaintiff for \$3,000, which latter was affirmed by the Court of Appeals. 86 Ky. 556. Petition for rehearing overruled. 86 Ky. 563.

In LOUISVILLE & NASHVILLE R. R. CO. v. HOWARD'S ADM'R, 82 Ky. 212 (1884), trespasser run over and killed while on railroad track at night, judgment for plaintiff in the Marion Circuit Court for \$5,000 was reversed. The syllabus of the official report states the case as follows:

"Appellants [the railroad company] had the exclusive right to the use of their railroad at the place where decedent lost his life, and they cannot be held responsible unless it should appear that those in charge of the train, after discovering the condition and danger of the party injured, could, by proper care, have avoided the injury.

"The right of a railroad company to use its track is exclusive of the public, except where the public have the right to cross it, or

where the use of the road in a reckless or improper manner must necessarily endanger the lives of those whose proximity to it requires the exercise of care and caution.

"In passing through cities and towns greater care must be exercised than on that portion of the road where human beings have no right nor license to be, especially at night.

"The mere fact that the speed of appellant's train is unusually fast at a point where no intelligent human being can have the right to be on the track, is of no significance in favor of intestate. He had no right to be on the track, and being a trespasser, at eleven o'clock at night, wilful neglect must be shown on the part of appellants before they can be held responsible."

In *SHACKLEFORD'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.*, 84 Ky. 43 (1886), person run over on track, judgment for railroad company was affirmed. It was held that "the unusual speed of a train is not neglect as to one who voluntarily places himself upon the track where he has no right to be. In such cases the company is not liable unless those in charge of the train, after discovering the danger, could, by the exercise of proper care, have avoided the injury. The failure of trains to give the customary signals in approaching public crossings is not negligence as to trespassers who may be crossing or using the track elsewhere." The facts in the case were: "A woman living at a section-house belonging to appellee [railroad company], as a servant of the occupant, who was a section boss of the company, was, while crossing the railroad track to reach the milk yard belonging to the house, struck by a passing train and killed. The train was running at the rate of twenty-five or thirty miles per hour. No signal was given of its approach to a public crossing a mile distant, or to a neighborhood crossing near by, or to the section house. *Held*, that the woman was a trespasser, and that there was no negligence upon the part of the company as to her."

In *JOHNSON'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.*, 91 Ky. 651 (1891), person on track killed by train, judgment for defendant was affirmed. It was held that "where an adult person steps upon a railroad track in front of and in full view of an approaching train, those in charge have the right to presume that his own consciousness of danger will cause him to leave it before the train reaches him; and in case the person is deaf, or otherwise deficient in his faculties, so as to render him unconscious of his impending danger, the knowledge of such infirmity must be brought home to those in charge of the train before the railroad company can be made liable."

CONLEY'S ADM'R v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R'Y CO., 89 Ky. 402 (1889), person killed on track, judgment for defendant reversed, it being held that "to turn cars loose at night, to move by their own momentum, without an engine attached, and without a light in front to warn persons on the track of their approach, is negligence even as to a trespasser on the track."

Duty of railroads to trespassers. — See LOUISVILLE & NASHVILLE R. R. Co. v. SCHUSTER, 10 Ky. Law Rep. 67; SHELBY'S ADM'R v. CINCINNATI, ETC., R. R. Co., 85 Ky. 224.

SIGNALS AT CROSSINGS. — In LOUISVILLE & NASHVILLE R. R. Co. v. COMMONWEALTH, 13 Bush (Ky.) 388 (1877), it was held that "it is the duty of a railroad company to cause signals to be given where the safety of travelers on intersecting roads demands that a warning should be given of approaching trains. A habitual failure to give such signals or warnings, is an offense against the public—an indictable nuisance." Judgment of Marion Circuit Court, imposing fine upon railroad company on conviction under such an indictment, affirmed.

As to sufficiency of signal. — See ILLINOIS CENTRAL R. R. Co. v. DICK, 91 Ky. 434; PADUCAH & MEMPHIS R. R. Co. v. HOEHL, 12 Bush (Ky.) 41.

Duty to signal at public crossings. — See PADUCAH, ETC., R. Co. v. HOEHL, 12 Bush (Ky.) 41; LOUIS., C. & L. R. R. Co. v. GOETZ, 79 Ky. 444, 80 Ky. 103; SHACKLEFORD v. LOUIS., ETC., R. R. Co., 84 Ky. 43; ESKRIDGE v. R. R. Co., 89 Ky. 374; ILL. CENT. R. R. Co. v. MIZELL, 100 Ky. 235. See also KENTUCKY STATUTES, sections 786 and 1642, and CIVIL CODE, section 19.

SIGNALS AT PRIVATE CROSSING. — In CAHILL v. CINCINNATI, ETC., R'Y CO., 92 Ky. 345 (1891), it was held that "while the failure of those in charge of a railroad train to give signal of its approach to a private crossing is not generally regarded as negligence, yet where a signal which it is the duty of the company to give, and which is usually given, at a public crossing, may be heard at a private crossing near by, those entitled to use the private crossing have the right to rely upon the signal being given, and the failure to give it is negligence as to them as well as to persons traveling on the public highway."

"The failure to give signals of the approach of a train to the crossing of a private way is not negligence, and if one steps upon the track at such a crossing without looking or listening, and is struck by a train, his injuries must be regarded as the result of his

own negligence." *JOHNSON'S ADM'R v. LOUISVILLE & NASHVILLE R. R. Co.*, 91 Ky. 651 (1891). See also *HUCKER v. KY. CENT. R'Y Co.*, 7 Ky. L. Rep. 761.

BRAKEMAN INJURED COUPLING CARS — GROSS AND CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. — In *LOUISVILLE & NASHVILLE R. R. CO. v. MCCOY*, 81 Ky. 403 (1883), brakeman injured coupling cars, judgment for plaintiff in the Jefferson Court of Common Pleas for \$7,593.50 was reversed for erroneous instructions on gross and contributory negligence. It was held that the following instructions were erroneous: First, "The court instructs that ordinary care is that degree of care which an ordinarily careful and prudent man usually exercises under like or similar circumstances, in taking care of himself, his family, or his property, or in the transaction of his business, when the same may endanger the safety of others." Second, "The court instructs the jury that gross negligence is that degree of negligence which indicates intentional wrong to others, or such a reckless disregard of their security or rights as to imply bad faith." As to the first: It is going too far to require that degree of care from railroad employees to others as that which any of such persons would take of "his family" under like circumstances as the injured party was placed. As to the second: Neither intentional wrong, nor the implication of bad faith necessarily belongs to the proper definition of gross neglect. Gross negligence is not equivalent to fraud or malice, while it may "furnish evidence of fraud," or tend to show malice (*citing TUDOR v. LEWIS, ETC.*, 3 Met. (Ky.) 385; *LOUIS. & NASH. R. R. Co. v. ROBINSON*, 4 Bush (Ky.) 509; *HANSFORD v. PAYNE*, 11 Bush (Ky.) 382).

In the *McCoy* case (*supra*), the court (per HARGIS, CH. J.), said: "So much of the case of *LOUIS. & NASH. R. R. Co. v. ROBINSON*, 4 Bush (Ky.) 509, as holds that 'gross neglect is either an intentional wrong, or such a reckless disregard of security and right as to imply bad faith, and therefore squints at fraud, and is tantamount to the *magna culpa* of the civil law, which in some respects is *quasi-criminal*,' is *overruled*, because it confuses elements of wilful neglect, and substitutes them for those of gross neglect."

Collision and crossing cases. — See also *CENTRAL PASSENGER R'Y Co. v. KUHNS*, 86 Ky. 578 (passenger injured in collision between street car and train at railroad crossing); *EAST TENNESSEE COAL Co. v. HARSHAW*, 16 Ky. Law Rep. 526 (child run over while attempting to cross railroad track).

**MCDONALD v. LOUISVILLE AND NASHVILLE
RAILROAD COMPANY ET AL.**

Supreme Court, Louisiana, June, 1895.

[Reported in 47 La. Ann. 1440.]

COLLISION BETWEEN TRAINS — JOINT NEGLIGENCE OF RAILROAD COMPANIES. — A collision of railroad trains brought about by the concurring negligence of two companies will render them liable *in solido* to an injured party.

(Syllabus by the Court.)

APPEAL from the Civil District Court for the Parish of Orleans. The facts appear in the opinion. *Judgment modified.*

DENEGRE & DENEGRE, for Louisville & Nashville R. R. Co., defendant and appellee.

HARRY H. HALL, for New Orleans & Northeastern R. R. Co., defendant and appellee.

FARRAR, JONAS & KRUTTSCHNITT, for East Louisiana R. R., defendant and appellant.

McEnery, J. — The defendant corporations are sued *in solido* for \$10,000 damages inflicted upon plaintiff's wife in a collision of the trains of the first two defendants at the intersection of the New Orleans & Northeastern Railroad and the Louisville & Nashville Railroad, at People's avenue and Patriot street, on the morning of October 14, 1894. There was judgment against the East Louisiana and New Orleans & Northeastern Railroad Companies *in solido*, for plaintiff, in the sum of \$1,250, with five per cent. from date of judgment. The East Louisiana, to reach its own track, has to pass over and use the track of the New Orleans & Northeastern Railroad Company. The East Louisiana was running its own train and on its own schedule. They are separate corporations, and the contract between them is for the mutual interest of both lines, covering the interchange of traffic, between points on the line of the road of the New Orleans & Northeastern south of, but not including, Pearl River station. There is nothing in the agreement to indicate ownership of the East Louisiana by the New Orleans & Northeastern, nor is there any stipulation that would indicate that the latter road is to be responsible for any damages to third parties by defective equipments of the former's trains running over the New Orleans & Northeastern tracks. The plaintiff's wife was a passenger on the

Louisville & Nashville Railroad when the collision occurred, and received severe and painful injuries, from which she has not entirely recovered when this suit was filed (1). At the crossing, the Louisville & Nashville road, it is conceded, had the right of way, — that is, the right, when trains on both tracks were approaching the crossing, to pass over first. The Louisville & Nashville Railroad train, as it approached the crossing, stopped at the “stop boards,” some three or five hundred feet from the crossing. It gave the usual signals, but no response was made by the train of the East Louisiana road. The engineer of the Louisville & Nashville train, believing the track was clear from hearing no signals, moved forward to cross. When seventy-five feet from the crossing, he saw the East Louisiana train coming, at a distance of three-quarters of a mile. The train moved on. The engineer says he was sure the engineer of the East Louisiana was preparing to stop. When one car was on the crossing, the engineer of the Louisville & Nashville became convinced that the East Louisiana would not stop. He then put on all the force he could to clear the crossing. There were eight coaches in his train, and the East Louisiana struck the sixth coach. The train, when put in motion to cross, was going at the rate of six miles per hour. The “slow post” on the Northeastern road is 3,500 feet from the crossing; the “stopping post,” 300 feet. The engineer of the Louisville & Nashville says, in his testimony: “When I saw him rolling by the ‘stop board,’ I knew the speed he was going at. I saw that he was not going to stop his train, and I threw the reverse lever down in the corner, and opened the throttle valve to get out of his way as quick as I could; but I couldn’t do it quick enough, on account of stopping at the ‘stop board.’” The engineer of the East Louisiana says that as he approached the “slow board” he blew the whistle for the crossing, and “let his train,” as he supposed, “roll up, ‘half ways,’ as it was an

1. *Passengers injured in collisions.* — See also the following cases: *VARILLAT v. NEW ORLEANS & CARROLLTON R. R. Co.*, 10 La. Ann. 88 (1855), passenger on street car injured in collision; judgment for plaintiff for \$1,000 reversed on ground of erroneous instruction on damages.

FRANK v. NEW ORLEANS & CARROLLTON R. R. Co., 20 La. Ann. 25 (1868),

infant passenger killed in street car collision; judgment for plaintiff for \$5,000 affirmed; *citing* *CHOPPIN v. NEW ORLEANS & CARROLLTON R. R. Co.*, 17 La. Ann. 19.

HOLZAB v. NEW ORLEANS & CARROLLTON R. R. Co., 38 La. Ann. 185 (1886), passenger on street car injured in collision; judgment for plaintiff for \$300 affirmed.

incline." He was going at a high rate of speed, twenty-five miles per hour. When halfway between the "slow board" and the "stop board," he applied the air brake, but it did not work. He called for hand brakes, and succeeded in reducing the speed of the train to two miles, when it struck the Louisville & Nashville train.

There is no doubt as to the negligence of the East Louisiana. The air brake, it is said, was in good condition when the train left the depot, and that it had been inspected prior to the departure of the train. The defect in the brake is accounted for on the supposition that it had been maliciously tampered with. There is no evidence of any kind that points to this conclusion. It is much more reasonable to assign as a cause the oversight of the inspector, or some inherent defect in the brake, than to attribute it to some depraved and malicious creature, without the slightest suspicion even upon any one. Notwithstanding this defect in the air brake of the East Louisiana road, the accident would not have happened had the engineer of the Louisville & Nashville exercised ordinary care and judgment. When he saw the train, it was in time — about two minutes from the crossing. It would take his train about the same time to go over the distance, say 1,100 feet from where he was when he first saw the approaching train, in order to clear it, if it kept at the same speed at which it was going, twenty-five miles per hour. Human life is too precious to take chances in the small margin of time here presented. He ought to have stopped his train, and waited for the stopping of the approaching train at the "stop board" on the Northeastern Railroad track. Although the Louisville & Nashville train had the right of way, the engineer had no right to exercise it in the presence of immediate danger. In attempting to exercise this right, with the approaching train so near the crossing, he had to assume that it was in order in all its equipments, and no contingency would prevent its stopping at the "stop board." The engineer's experience and his trained judgment ought to have taken in the situation and appreciated the danger in taking such chances within such limited time. The fraction of a minute was important in calculation, and the least derangement of the machinery or equipment of the approaching train would cause the loss of this precious time. Surely human life is too valuable to be sacrificed to save, in the scheduled time of a train, such an inappreciable amount. Both trains were in default, and

the fault of each was simultaneous, and concurred as a proximate cause in bringing about the accident. They are liable *in solido* to the plaintiff.

It was said in argument that there was no contractual obligation between the plaintiff and the East Louisiana Railroad, as he was not a passenger on its train. The claim for damages arises as against the East Louisiana road *ex delicto*. Had the Louisville & Nashville been without fault, would the plaintiff have been denied relief against the East Louisiana road? We see no force in this contention. It is ordered, adjudged, and decreed that the judgment appealed from be amended, reversing that part as to the New Orleans & Northeastern Railroad Company, and that part as to the Louisville & Nashville Railroad Company; and it is now ordered that plaintiff's demand against the New Orleans & Northeastern Railroad Company be dismissed, and that there be judgment against the Louisville & Nashville Railroad Company *in solido* with the East Louisiana Railroad Company for the amount of the judgment appealed. In other respects the judgment is affirmed, the defendant road against which judgment is rendered to pay costs of appeal.

NICHOLS, CH. J., absent.

REHEARING refused.

MERCIER V. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

Supreme Court, Louisiana, March, 1871.

[Reported in 23 La. Ann. 264.]

COLLISION BETWEEN VEHICLE AND STREET CAR — BURDEN OF PROOF — CONTRIBUTORY NEGLIGENCE. — To enable a party to recover damages for injuries caused him by a collision with a street car, he must show that he exercised a reasonable degree of prudence and caution in endeavoring to avoid the accident. If, on the contrary, the evidence shows that the person injured by such a collision, while the car was in motion on the track, failed to exercise a reasonable degree of prudence, which if he had done the accident would not have occurred, he cannot recover damages from the company for the injuries received, either to his person or his property, even though the driver of the car be himself at fault (1).

(Syllabus by the Court.)

1. In *VINCENT v. MORGAN'S LOUISIANA & TEXAS R. R. & STEAMSHIP CO.*, 48 La. Ann. 933 (1896), collision between vehicle and train at crossing, it was

APPEAL from the Seventh District Court, parish of Orleans. The facts appear in the opinion. *Judgment reversed.*

C. ROSELIUS and C. DUFOUR, for plaintiff and appellee.

W. H. HUNT and L. E. SIMONDS, for defendant and appellant.

Ludeling, Ch. J.—The plaintiff claims \$10,000 damages for injuries to his person and to his buggy and horse, caused by a collision with one of the cars of defendant in 1867. There was judgment against the defendant for \$7,041, and the defendant appealed.

From the plaintiff's own statement in the record, it appears that he was going along Erato street, across St. Charles street, towards the swamp, in his buggy, with the top thrown back, so that he could clearly see all around him; that he was driving at a slow trot; that he crossed the first track safely, but before clearing the second track a car going up toward Carrollton struck the hind wheel of the buggy and broke it, throwing him out and inflicting a wound on the left elbow and injuring two fingers of the right hand; that he saw the car approaching at a fast trot; saw the driver apparently making change, with his face turned from him; that he called to the driver of the car to stop, and on perceiving that the driver did not turn or appear to hear him, he called out a second time; that he proceeded across the track leisurely, neither attempting to check his horse or quicken his speed; that when he called to the driver the second time the latter turned, but it was too late, the car was not stopped in time to prevent the accident.

From his own statement it appears the plaintiff saw the danger, and yet he incurred the risk. He could have avoided it by stopping until the car had passed, or by quickening the pace of his horse, but he chose to do neither. He called upon the driver, who did not see the danger, to do what it was his duty to have done. Whether the defendant was in fault or not is not material in this case, as it is clear that the plaintiff's heedless conduct directly contributed to the collision. 9 La. Ann. 441, 3 La. Ann. 48; Knight *v.* Pontchartrain R. R. Co., 23 La. Ann.

held that "parties having occasion to cross a car track must bear in mind that in the management and business of railroads special trains are liable to be sent forward at any moment, and that the rule that a person before at- tempting to cross a track must stop, look and listen to guard against danger, is not confined to certain hours of the day or night, nor limited to particular trains" Judgment for plaintiff for \$10,000 reversed.

462 (1). It is now well settled that if a party injured might have avoided the accident by the exercise of a reasonable amount of prudence, and he did not do it, he cannot visit his own indiscretion or want of judgment upon the other party, even though that party be himself in fault. *Redfield on Railways*, 119, § 117.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the District Court be annulled, and that there be judgment in favor of the defendant rejecting the plaintiff's demand, with costs of both courts.

**BARKSDULL (FOR THE USE OF HIS MINOR CHILD,
CHARLES RANSON BARKSDULL) V. NEW
ORLEANS AND CARROLLTON
RAILROAD COMPANY.**

Supreme Court, Louisiana, March, 1871.

[Reported in 23 La. Ann. 180.]

BOY RUN OVER BY STREET CAR — DAMAGES. — A street railroad company is responsible in damages if, through the negligence or carelessness of the driver of the street car, a boy is run over and injured. The measure of the damages in such cases is to be determined by the extent of the injury done. If the finding of the jury is supported by the evidence in the record both as to the fact of the infliction of the injury through the carelessness and negligence of the driver of the car and the extent of the injury done, their verdict fixing the amount for which the company is liable, will not be disturbed on appeal.

CONTRIBUTORY NEGLIGENCE OF PARENT — DEFENSE. — If the evidence shows that the boy who was run over by the car was physically and mentally able to take care of himself on the street, and that he was in the habit of traveling the public streets alone, the driver of the car or the company owning the road will not be permitted to set up in defense to the action for damages, that the accident occurred through the negligence or want of consideration in the father in allowing the child to go on the streets alone, nor will the fact that the child failed to get out of the way be allowed to weigh in favor of the company in mitigation of damages, if the evidence shows, as in this case, that the driver was driving the car at the time of the

1. *Damont v. New Orleans & Carrollton R. R. Co.*, 9 La. Ann. 441, is reported in 3 Am. Neg. Cas. 504 (passenger alighting from car while in motion); *Carlisle v. Holton*, 3 La. Ann. 48, is cited in 3 Am. Neg. Cas. 513; *Knight v. Pontchartrain R. R. Co.*, 23 La. Ann. 462, is reported in 3 Am. Neg. Cas. 510.

See also on this point (contributory negligence precluding recovery), *Fleytas v. Pontchartrain R. R. Co.*, 18 La. Ann. 339; *Hubgh v. Carrollton R. R. Co.*, 6 La. Ann. 496; *Hill v. Opelousas R. R. Co.*, 11 La. Ann. 292; *Myers v. Percy*, 1 La. Ann. 374; *Murphy v. Deamond*, 3 La. Ann. 411.

accident at an unusual, if not an unlawful, rate of speed. But in such case the company will be held liable to the full extent of the damages caused by the injuries which the boy has sustained (1).

(Syllabus by the Court.)

APPEAL from the Sixth District Court, parish of Orleans. The facts appear in the opinion. *Judgment affirmed.*

GIBSON & AUSTIN, RUFUS WAPLES and W. H. HUNT, for plaintiff and appellee.

L. E. SIMONDS, for defendant and appellant.

Taliaferro, J. — This is an action brought by a father for the use of his minor child against the defendants to recover damages for alleged injuries of a most serious character inflicted upon the child, a boy of about the age of five years and a half, through the gross and culpable carelessness and negligence of a car driver, an agent and employee of the company, by which negligence the child was run over by one of their street cars and horribly mangled, having both his legs crushed, making it necessary to amputate both, one above the knee, thus rendering him a hopeless cripple for life. The plaintiff prays damages to the amount of \$50,000. The answer is a general denial. The defendants specially deny the culpable negligence charged and say they are not liable in damages to the plaintiff.

The case in the lower court was before a jury which gave a verdict of \$15,000 as damages, and from the judgment, responsive to the verdict, the defendants have appealed.

We gather from the evidence that the deplorable accident happened on the nineteenth of June, 1866, at the intersection of St. Charles and St. Mary streets in the city of New Orleans. There is much difference in the statements of witnesses as to the precise spot where the car ran over the child. Not long before the accident he was seen sitting on the end of one of the cross-ties which projected several feet beyond the car track and partly over the ditch on the right-hand side of St. Charles street, in coming down from Carrollton. The distance between the center of this tie and the upper crossing of St. Mary street is shown to be six feet.

1. In **KETCHUM v. TEXAS & PACIFIC R. R. Co.**, 38 La. Ann. 777 (1886), boy eleven years old run over by engine while driving wagon across track at street crossing, judgment for plaintiff for \$10,000 was affirmed, the railroad company's servants being guilty of negligence in running engine at unusual speed in depot yard and not giving signal of approach at crossing. See also the case next reported herein.

But the inquiry regarding the *locus in quo* is satisfied by the concurrence of the witnesses in relation to where the child was lying after the car passed over him. He was found lying *in St. Mary street*, near the upper crossing of that street over St. Charles street, which crossing is the first passed over at St. Mary street by cars coming down from the direction of Carrollton. The testimony of the newsboy, Confort, who was the first upon the spot after the accident and who took up the child, is very clear and distinct on this subject. He says: "Just as soon as he was run over I ran to him. There was nobody else with him. He was in the middle of the track on St. Mary street. He was lying where he was run over, lying in the same place." It is in proof that at the time of the occurrence two horse cars and a train of steam cars were coming down St. Charles street and were near each other. One of the witnesses says the horse cars were racing, and four of the witnesses at least say that the car which ran over the boy was moving rapidly. One of them states that "the driver was whipping his mule." "On this occasion the mule was put to his best." Another says: "He was whipping the mule very fast; the mule was in a gallop; both horses were in a gallop in the other car." A third witness says: "I do know the two cars were *running*, Mr. Burke (the name of the driver implicated) and another car; it was one of those long cars." A fourth said: "The mule was going pretty fast because the driver could not stop it; he would not stop it altogether, but he was going to stop it some; I knew he was behind time because he had plenty of passengers." The driver himself on the stand said: "I put on the brakes and the harder I put on the brakes the harder the mule pulled; the brake did not have the desired effect on the car on account of having so many passengers; if it was not for that, I might have stopped the car before the child was run over." In answer to the question: "How many passengers had you?" he replied: "Seventeen or eighteen, perhaps twenty, I cannot exactly say; I had four on the platform, the two sides were full and they were standing up inside."

The testimony establishes clearly that the car was going at a greater speed than usual and greater, we infer, than that permitted by the city ordinances, for we find that the steam cars were not allowed, within the city limits, to run at a faster rate than four miles per hour. One of the witnesses thought that the car, as it passed him between Jackson and St Andrew streets, "was

going at the rate of eight miles an hour." The mule it seems was not a safe and properly trained animal for the business. The driver stated that the steam cars passed him about half a square back from where the accident happened; that he saw the mule begin to shy and become excited on seeing the steam train, and it was then he put on the brakes but ineffectually.

There are two bills of exceptions in the record to the charge given by the judge to the jury on the trial of the case in the lower court. It is not necessary in determining this case to pass upon them specially. They relate to the rules in regard to what is termed contributory negligence. These rules have no application to the facts shown in this case. It is proved that the boy who was overtaken by this terrible disaster, is a child of more than ordinary activity and intelligence; that he was capable of taking care of himself; that his parents frequently sent him about on errands and on several occasions to get things at the Magazine Market, many squares off from the place of their residence. There is no question that he was run over while endeavoring to cross St. Charles street on the upper crossing of St. Mary street. He had a right to be on the streets, and it was no carelessness in his father to permit him to be upon them.

On the other hand the evidence does show on the part of the driver, if not a malicious carelessness, at least a negligence and want of care highly culpable in a man whose duties require him to be constantly on the alert and to exercise judgment and caution in the performance of those duties. Apart from its responsibilities for the acts of its agents, we are not prepared to say that the company may not have been remotely at fault in the matter of supervision over the manner in which their business was conducted. The developments of this case, we will further remark, present in our opinion matter of grave consideration for the lawmaker and which should suggest to him things *dignas lege regi*.

The judgment of the lower court, we think, was properly rendered, and it is, therefore, affirmed.

BARNES v. SHREVEPORT CITY RAILROAD COMPANY.

Supreme Court, Louisiana, June, 1895.

[Reported in 47 La. Ann. 1218.]

CHILD RUN OVER BY STREET CAR — CONTRIBUTORY NEGLIGENCE OF CHILD — DUTY OF RAILWAY COMPANY TOWARDS CHILD ON HIGHWAY — DUTY OF DRIVER OF STREET CAR — INSTRUCTION.

- 1. Under three years of age, a child is *prima facie* incapable of contributory fault (1).
- 2. Although a child may be in a public highway through the fault or negligence of its parents, and so be improperly there, yet, if he be injured through the negligence of the defendant, he is not precluded from his redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness, — to the utmost circumspection. And what would be but ordinary neglect in regard to one whom he had supposed to be a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger.
- 3. It is the duty of the driver of a street car, not only to see that the railroad track is clear, but also to exercise constant watchfulness and care for persons who may be approaching the track.
- 4. It is a correct charge to a jury to say that a car driver "can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would have noticed or done, with ordinary vigilance; when he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected to happen."

(Syllabus by the Court.)

APPEAL from the First Judicial District Court for the parish of Caddo. The facts appear in the opinion. *Judgment amended and affirmed.*

T. F. BELL and E. H. RANDOLPH, for plaintiff (appellee).

WISE & HERNDON, for defendant (appellant).

1. But in *CULBERTSON v. CRESCENT CITY R. R. Co.*, 48 La. Ann. 1376 (1896), for \$15,000 reversed. Rehearing refused.

child killed by street car at crossing, it was held that the fact that a child may not be capable of contributory negligence, does not always render the defendant liable upon the mere proof of the act causing the injury. There is no liability for the sudden act of a child. If defendant's employee was not careless or negligent, the defendant cannot be rendered liable for injury to child. Judgment for plaintiff

See also similar ruling on similar facts in *GALLAGHER v. CRESCENT CITY R. R. Co.*, 37 La. Ann. 288 (1885), where judgment for plaintiff was reversed.

See also *HOUSTON v. VICKSBURG, SHREVEPORT & PACIFIC R. R. Co.*, 39 La. Ann. 796 (1887), parent and child run over by train while crossing track; judgment for plaintiff for \$13,970 reversed, on ground of contributory negligence.

Watkins, J. — This suit is for the recovery of \$10,000 damages against the defendant for injuries sustained by the plaintiff's infant child, of three years of age; it being run over by one of defendant's street cars, which was operated by electricity, and its arm so broken and crushed that it had to be amputated, leaving it in a permanently crippled condition. The statement of the petition is that the accident occurred at the intersection of Texas and Crockett streets, in the city of Shreveport, defendant's car being at the time operated on Texas street, in carrying passengers; that, at the time of the occurrence, plaintiff's child was standing at or near the railroad track, where there is a curve or turn, thus being in a position in which the motorman operating the car could have easily seen it, had he been at his proper place, and carefully attending to his duties; that the accident was occasioned by the gross carelessness and negligence on the part of the railroad company, its servants, agents, and employees; that the injury inflicted upon the child caused it great pain and suffering, and resulted in its being maimed and disfigured for life. The defendant's answer is a general denial, coupled with the plea of contributory negligence on the part of the child and its parents.

The cause was tried by a jury, who rendered a verdict in favor of the plaintiff for \$3,000, and from the judgment of the court thereon based the defendant has appealed. In this court the plaintiff and appellee filed an answer to the appeal, and demands an amendment of the decree so as to award him the full amount claimed in his petition.

The testimony of all the witnesses concurs as to the following established facts, viz., that the accident happened in open daylight, while the car was slowly moving down grade, of its own weight and momentum, the electric current having been cut off; that the track and car were in apparently good order, and the motorman in charge of the car was a sober, prudent, and experienced employee; that not one of the several passengers who were in the car at the time either saw or knew of the happening of the accident. One witness states that as he was entering the car he saw the car strike the child, but that he did not notice what the motorman was doing at the time. Another witness states that as he came to the car he saw it, just as it was checking up, and just then the little boy rolled out from under it. A physician from the Charity Hospital testifies that he was a passenger on the car on the morning of the occurrence, and the substance of his

statement is as follows: That he was sitting near the fare box, when a passenger came in, and spoke to him, handing a quarter of a dollar to the motorman to make change, so he could deposit his fare in the fare box. Heard the passenger ask the motorman for change, and saw the motorman give him the change. That, just as he gave him the change, witness observed the motorman apply the brake in a rather excited manner, and soon afterwards all the passengers became excited and stood up, — the witness among the number. That just about that time he heard a little child scream, and, looking out of the window, he saw a little fellow holding his arm in his hand. Then he ran out quickly, and caught hold of the arm, to prevent a hemorrhage. That, upon learning whose child it was, he directed that he be at once carried home, and that he went there also, and applied a bandage on the broken limb, and, just as speedily as possible, telephoned to the hospital for his instruments, and amputated it. That he amputated it just about the junction of the upper and middle third, just above the elbow. That the arm was crushed above the elbow, and there was no such thing as saving the arm, amputation being absolutely necessary. Another witness corroborates the physician's statement with reference to the motorman's giving a passenger change about the moment of the occurrence. He heard the cry of alarm made by some passengers, and saw the motorman catch hold of his brake "as quickly as possible," and try to stop the car, "but it was a little too late to stop the car." He states that there was no conductor on the car, and defendant's cars are not provided with conductors; the double duty being, by the company's regulations, imposed on the motorman of handling the car and making change for the passengers. He says that when the car is in motion the motorman's post of duty is on the front platform of the car, and that he occupies a position so he can look on either side; that the car is provided with a brake on the front platform, so that he can arrest the speed of the car, and also with an apparatus so that he can cut off and turn on the electric current at will. He says that at the place where the accident occurred there is a switch, and the car passes slightly down grade from the switch to the main line, and that in thus passing off of the switch it is customary for the motorman to slow up, by cutting off the current and permitting the car to run down of its own momentum. Another witness, who had a seat in the car by the side of the physician who testified, gives much the

same relation of facts as the latter did. He speaks of the passenger who came in, and walked up to the motorman to get change to pay his fare. He states that "the motorman turned around to make the change for him about the time [the car] was going out of the switch;" that it had gone probably fifteen or twenty feet [while] he was making change, and he turned partially around, so as to make the change for the passenger;" that, immediately after having received his change, the passenger made some remark and the motorman commenced turning his brake to stop the car. Another witness, standing at a blacksmith shop near the switch, saw the car just as it came in contact with the child and pushed him over. He ran to the child immediately and picked him up, and carried him into his father's house, which was near by. Another witness, who was driving his cart, states that he was in the rear of the car, about thirty feet distant, and a little to the left of it, driving in the same direction in which the car was moving, and saw the accident. Saw the car just as it was checking up, and the little boy rolling out from under it. The passenger who was obtaining change from the motorman for the purpose of paying his fare states that he was standing at the front door when the accident occurred. He says that while the motorman was engaged in making change for him the little boy was standing outside of the railroad track, possibly at a distance of three to six feet; that when the car was within three feet of the child he took a notion to run across the track, to the other children, who were on the opposite side, and came in collision with the car; there were five or six children playing on the track before the car had reached the point where the accident happened, but they had moved on upon the approach of the car, separating from the little fellow who was run over; that as he observed the movement of the little boy he caught at the brake, and the motorman caught it at that instant, and checked the car; that he thinks the motorman saw the child just about the time he stated, but he did not have sufficient time to stop the car; it was too late.

The foregoing is a fair summary of all the testimony which was adduced on the trial in favor of the plaintiff, and nothing to the contrary was developed by the witnesses for the defendant. It is a noteworthy fact that the motorman, White, who was operating the car which inflicted the injury, was neither summoned nor interrogated as a witness for the defendant, notwithstanding

he was known to have been in the adjoining parish at the time of the trial, he being no longer in the service of the company. Following a general rule which has ever been in favor with this court, we feel at liberty to presume that, if he had been produced as a witness by the defendant, his evidence would have been adverse to its pretensions. Having been the motorman who had charge of the car, and through whose carelessness and negligence the accident and injury happened, it was defendant's plain duty to have placed him on the stand, and purged him of his fault, if indeed, he could have done so; and, as he was neither produced nor interrogated, all the legal presumptions are unfavorable to his testimony.

Imprimis, we may dispose of the defendant's charge of contributory negligence in respect to the child by observing that it was only three years old, and incapable, *per se*, of contributory fault; and, in respect to that of the parents, there is no proof of contributory fault of any kind. *Westerfield v. Levis*, 43 La. Ann. 63. Mr. Thompson states the rule thus pertinently, viz.: "Although a child of tender years may be in the highway through the fault or negligence of its parents, and so be improperly there, yet, if he be injured through the negligence of the defendant, he is not precluded from his redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness, — to the utmost circumspection; and what would be but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger." 2 Thomp. Neg., p. 1129. The same author says: "It is the duty of the drivers of street cars not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track." 1 Thomp. Neg., p. 398. But, in even clearer and more cogent terms, Mr. Beach states the rule thus: "If, however, he (the engineer or driver) sees a child of tender years upon the track, or any person known to him to be, or, from his experience, giving him good reason to believe that he is, insane or badly intoxicated, or otherwise insensible to danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act on the belief that he might not or would not, and should therefore take means to stop his train in time." Beach, Contrib. Neg., p. 395. Defendant invokes the rule as announced in *Gallagher*

v. Railroad Co., 37 La. Ann. 288, to the effect that "a car driver can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would notice or do with ordinary vigilance; when he fails to be prepared for something visible; or at least of probable occurrence, or that might be reasonably expected of him. If the accident happened from a sudden and unanticipated act, which is the result of the thoughtless impulse of a child, of which human forethought could not be prescient, no liability attaches to the driver or to his employer." The rule thus formulated is undeniably correct, and does not differ from the rule we have quoted from *Thompson and Beach*. But is this one such a case? Evidently not, for, instead of the motorman of defendant's car being on the lookout while his car was slowly descending the switch to the main track, propelled by its own momentum, he was engaged in making change for a passenger; and, in consequence of his attention having been thus diverted, he failed to observe the perilous situation of the child in time to arrest the progress of the car and prevent the happening of the untoward event. It seems quite apparent to us that, if the motorman had postponed making change for the passenger until his car had passed off the switch, he could, and most likely would, have seen the child, and averted the accident.

The judge *a quo*, in his charge to the jury, very correctly said: "A railway company is bound to keep a proper lookout, especially in populous localities, for objects on its tracks ahead of a moving train; and if a child is seen thereon it should bring its train to a stop, and upon its failure to do so it is chargeable with actionable negligence. The same rule applies to an electric car company, and in case of children of tender age the proper inquiry is whether the person in charge of the motor car failed to observe or do something which he ought to have seen or done, and which he would have seen or done, with ordinary vigilance." This charge, in our view, is in strict keeping with the rule that is announced by authors and jurists, and the jury were evidently mindful of the judge's instructions, in rendering a verdict in favor of the plaintiff. We think a case of damages is made out by the law and the evidence, but our opinion is that the allowance made by the jury is not enough, and that it should be increased to \$5,000. It is therefore ordered that the amount of

damages be increased to \$5,000, and, as thus amended, the judgment be affirmed.

NICHOLLS, Ch. J., absent.

Rehearing refused.

STATE V. BOSTON AND MAINE RAILROAD COMPANY.

Supreme Judicial Court, Maine, June Term, 1888.

[Reported in 80 Me. 430.]

DRIVING ACROSS RAILROAD TRACK — DUTY OF TRAVELER — STOP, LOOK AND LISTEN — CONTRIBUTORY NEGLIGENCE. — The rule which requires that a traveler on the highway shall look and listen before he attempts to drive across a railroad track, also as imperatively requires that, if a coming train is heard by him, and there be doubt whether the train is upon such track or some other, he shall stop at a safe distance from the crossing until all doubt is solved as to its location, unless deceived by surrounding circumstances, and without his fault (1).

KILLED AT RAILROAD CROSSING — GATES AT CROSSING — LIABILITY OF RAILROAD. — The deceased in this case, with two associates, was riding in a wagon towards a railroad crossing, at about ten o'clock in the evening of a starlight night, one of the associates owning and driving the team, and carrying the other two gratuitously as a neighborly kindness, when a locomotive whistle was heard by them. They expressed doubt among themselves whether the train was on the road they were to cross, or on another road farther away running in the same direction, and continued driving on slowly, intent upon the noise of the train. They could not see the train on account of buildings and bushes between them and it. The bell was not heard by them. As they approached nearer, they saw the gates at the crossing wide open and no person in attendance upon them, although they had been accustomed to seeing the gates in operation and a flagman there. For several years the practice of the road had been to keep a flagman in attendance at the crossing, but, unknown to these persons, he usually left the place at about seven in the evening for the night. The train was the night Pullman from Boston going east, which for most of the time for many years had not run upon this road, but had run upon the other road of the same company before spoken of. The train was running through a compact portion of the city of Biddeford, at an unlawful rate of speed for such a place, and at the rate of twenty-five miles an hour, or more, when the collision occurred, and the person for whose death this suit is brought was instantly killed. It is stipulated by the parties that the plaintiff shall recover if these facts would in any event authorize a jury to find a verdict in favor of the plaintiff. *Held*, that a verdict for the plaintiff might be upheld.

1. See NOTE ON THE RULE OF "STOP, LOOK AND LISTEN," in 9 Am. Neg. Rep. 408-416.

GATES — STATUTE. — The defendants cannot escape liability upon the ground that no statute required them to maintain gates at the crossing. The voluntary establishment of gates is evidence of their necessity and, being advertised to travelers, it is evidence of negligence if they are not properly attended and maintained.

IMPUTED NEGLIGENCE. — Less responsibility may have rested on the two persons who were passengers than on the driver who owned and drove the team. The doctrine of the English case of *Thorogood v. Bryan*, 8 C. B. 115, which imputes to a passenger the negligence of a driver over whom the passenger exercises no influence or control, as far as it has obtained a footing in this State, is overruled (1).

(Official.)

AN INDICTMENT under the statute for the alleged negligent killing of William R. Benjamin, of Biddeford, in a collision at the Main street crossing in Biddeford, in the evening of November 26, 1886. The facts are stated in the opinion. *Judgment for plaintiff.*

H. H. BURBANK, County Attorney, for the State.

GEORGE C. YEATON and B. F. CHADBOURNE, for the defendant.

Peters, Ch. J. — After the plaintiff's evidence was out in this case, it was agreed by the parties that, if such evidence be, in the opinion of the full court, sufficient to authorize a jury, *in any event*, to find for the plaintiff, a judgment may be entered against the defendants for the sum of \$5,000.

Allowing to the plaintiff, under this stipulation, the benefit of the most favorable view which the evidence is legally susceptible of, it may be considered that the following facts are proved: The deceased, William R. Benjamin, for whose death the action is instituted in the name of the State, and two other men, of the names of Burnie and Hooper, the latter owning and driving the team, were sitting in an open one-seated wagon, and approaching at a moderate gait, or "very slowly," a level crossing of defendant's railroad over the highway in Biddeford. It was at about ten o'clock on a starlight night in November, 1886. The railroad and town road intersect at about a right angle. The three were persons of middle age, with physical faculties unimpaired, sober and intelligent, and were returning home from a lodge meeting of some kind over a road familiar to all of

1. See NOTE ON THE DOCTRINE OF THOROGOOD v. BRYAN, pages 145-146, *ante*. See also NOTE ON IMPUTED NEGLIGENCE, pages 151-156, *ante*.

them. When within about 350 feet of the crossing a locomotive whistle was heard, but no bell was heard by them at any time. The bell was heard by others at the moment when the locomotive was passing the crossing, the train at the time running at a rate of not less than twenty-five miles an hour through a compact portion of the city of Biddeford. When the whistle was heard, Burnie called Hooper's attention to it, and Hooper said he did not know which road it was on, meaning whether on the Boston & Maine or Eastern railroad. Burnie replied that he could not tell from the sound which road it was on. The deceased said nothing, and nothing more was said by either of them. The team moved on without stopping, and almost immediately it reached the Boston & Maine track, when a collision took place between locomotive and team by which two of the three men were almost instantly killed. The way on which the parties were traveling was slightly descending towards the crossing, and a view of the coming train was mostly obstructed from the travelers by houses and other structures, and the plans and photographs show that there may have been no opportunity for the travelers to see the train, situated as they were while in motion.

The defendants contend that the travelers did not look and listen after their interchange of words about the direction of the sound from the whistle. We think a jury would be justified in the belief that they did. On this point the survivor was not very explicit in his testimony, but he was not asked about it, nor was he at all exhaustively examined. The men did not in fact see the locomotive until they were within an estimated distance of fifteen feet from the track, the train being about one hundred feet away, and a collision may not then have been avoidable. At the place where the whistle was sounded the two railroads were within 300 feet of touching together, then diverging until at the crossing they were about 1,000 feet apart, the Eastern being the farthest away.

It is reasonable to believe that the three men, as they approached the crossing, saw that the gates there were open and unattended by any person, and that there was no signal of any kind indicating that a train was expected. A red light was burning, the usual switch signal, which was not any warning to those using the common roads. The gates were of the double-arm pattern, operating on pivots on each side of the highway, when open the arms standing erect, and these had been in use at this

crossing for about three years. An employee was in daily attendance upon them from seven o'clock A. M. until about fifteen minutes after seven P. M., when he usually locked the gates and left them for the night, doing so on the night of the catastrophe. The train which struck the wagon was the regular night Pullman train running from Boston to Bangor, on the Boston & Maine road. This train has run most of the time for many years over the Eastern railroad, but had been running over the Boston & Maine road for about a month before the accident, and had also run on the same road for a period of eight months during the year before the accident. The two roads were managed by the same company. The survivor, and the same thing may be fairly assumed of his associates, had seen that gates were in operation at the crossing, but had never noticed that they were not at all times used when trains were passing. They supposed that they were so used. The flagman in the railroad employment testified that, when for any reason the gates were out of order, he used a green lantern by night and a yellow flag by day whenever a train passed.

It is not denied that the defendants were themselves guilty of negligence. They were running their train at a rate of speed upwards of four times the rate allowed by law. Chapter 377 of the acts of 1885 prohibits a train running across a highway near the compact part of a town at a speed greater than six miles an hour, unless the parties operating the railroad maintain a flagman or a gate at the crossing. Had not the defendants been remiss in the discharge of this statutory duty, it is reasonable to conclude that the accident would not have happened.

Nor would the accident have occurred, the defendants contend, if the deceased had not also been guilty of negligence. Great stress is placed by the defendant's counsel upon the position taken for his clients that the three men did not look and listen for the location of the train, or, if they did, that they paid no heed to the signals which their ears revealed to them. It certainly cannot be denied that it was an egregious blunder for the team to continue moving on so near to the crossing, while the occupants could not tell from which railroad the sound of the whistle proceeded, unless other facts furnish an excuse for not stopping. The team should have halted. The very doubt felt by the men was notice enough of danger, unless they were, without their own fault, deceived by the surrounding circumstances.

The plaintiff's counsel insists that such excuse exists. It is contended on that side of the case that, taking into consideration that the train was not seen, though the deceased and his associates must have been intent upon their situation, as evidenced by their sudden silence as they were advancing on their way after their interchange of views on the subject, and considering also the fact that they had much reason to suppose that the Pullman train belonged upon the most distant road, the sight of the uplifted arms of the gates was evidence enough to dissolve all doubt in the minds of those men, and to induce them to believe that they could safely continue on without interruption. The plaintiff's counsel contends that such was the judgment of three men, who for intelligence and experience would average well with men generally.

The counsel for the defendants contends that the standing arms, indicating open gates, should not be regarded as any signal, or a sufficient signal, of safety, at any crossing where the law does not require gates to be maintained. At this place the gates were erected by the voluntary act of the company. But is it not a fair construction of the statute to say that it does require gates to be maintained, or a flagman to be present, at all grade crossings, as to trains moving more rapidly at such places than six miles an hour? And while a neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculation for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligations resting on it, where there is no indication that it will do the contrary. If the gates were open and the crossing unattended by a flagman, then these persons had a right to accept the fact as some evidence that the train would not attempt to pass the crossing at a faster speed than six miles an hour. Of course full reliance cannot always be placed on an expectation that a railroad company will perform its duties, when there is any temptation to neglect them, because experience teaches us that it would not be practicable to do so. But such an expectation has some weight in the calculation of chances, greater or less according to the circumstances. But what essential difference can it make in the relation of the parties whether the statute requires a flagman at any point or whether absolute necessity requires one; whether the legislature declares the necessity, or the company by its act confesses the necessity?

The defendants, by their counsel, contend that the English and New York authorities, cited by plaintiff, are based upon a statutory requirement that gates shall be maintained. That is not entirely correct. In a leading case, *Stapley v. London, Brighton & South Coast R'y Co.*, L. R. 1 Exch. 21 (1), it was said that while there was no law requiring gates as to foot passengers, still the decision was that the footman in that case was fairly invited by the open gates seen by him to attempt a passage across the tracks. Nor do we find that the New York cases place the responsibilities of railroads wholly on what the statute law requires of them as to guards at crossings. It is said in *Kissenger v. N. Y. & Harlem R. R. Co.*, 56 N. Y. 538, "though it is not negligence for a railroad company to omit to keep a flagman, still, if one is employed at a particular crossing, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company." See *Glushing v. Sharp*, 96 N. Y. 676. If the presence of a flagman and closed gates indicate a passing train, certainly the absence of the flagman and open gates must be evidence that a train is not presently due or expected. The annexed authorities touch nearly to the point involved in the facts here presented. *Wheelock v. Boston & Albany R. R. Co.*, 105 Mass. 203 (9 Am. Neg. Cas. 439 n.); *Tyler v. N. Y. & N. E. R. R. Co.*, 137 Mass. 238; *Sonier v. Boston & Albany R. R. Co.*, 141 Mass. 10; *Wharton, Neg.*, §§ 385, 386, and cases; *Pierce, Railroads*, 203, and cases.

The plaintiff's case is fortified by another consideration. He neither drove, nor, as far as appears, had any control of the team on which he was riding. It is reasonable to suppose that the owner carried him either for hire or gratuitously as a neighborly kindness. His position was not of the same degree of responsibility to the railroad as was that of the driver. He was a

1. In *Stapley v. London, Brighton & South Coast R'y Co.*, L. R. 1 Exch. 21, 4 H. & C. 93, it appeared that a railway intersected a public foot and carriage-way upon the level close to a station on the line. At the place of intersection spring carriage gates opened both ways, and there was also a swivel gate on each side of the line for persons on foot. A return-ticket-holder, while crossing the line at this place to reach the passenger station was killed by an

overdue express. At the time of the accident one of the swing gates was partially open, and there was no gate-keeper. *Held*, that this circumstance (which was in contravention of the provisions by statute, and by the company's rules for the protection of carriage traffic along the road) constituted an invitation to the ticket-holder to cross the line, and evidence of the company's negligence.

comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team, or could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent to the experience and discretion of the driver, who was in control of his own team, and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence.

And we may consider this point in the argument in behalf of the plaintiff, unless we adhere to the doctrine of imputable negligence, which has been considerably practiced on in the courts, first promulgated in the case of *Thorogood v. Bryan*, 8 C. B. 115, a doctrine which ascribes to a passenger the contributory negligence of a driver over whom he has no control (1).

This doctrine was never adopted in Scotland, nor by the English Admiralty Court, and was never at rest but has been constantly doubted and criticised in other English courts, until, in 1887, it was overruled by the Court of Appeal, without a dissenting vote on the question, in the exhaustively considered case of *The Bernina*, L. R. 12 Prob. Div. 58 (2). The action in that case, though originating in the admiralty, was brought under Lord Campbell's act, and was governed in all respects by common-law rules, and the full court of England unhesitatingly swept away the old rule, saying that it was a fictitious extension of the principle of agency unwarranted upon any rule or theory of law. It is remarked in that case that the preponderance of judicial and professional opinion in England is against the doctrine, and that the weight of judicial opinion in America is also against it. The same decision has been made in the Supreme Court of the United States in *Little v. Hackett*, 116 U. S. 366, where it is said that the doctrine of *Thorogood v. Bryan* rests upon indefensible foundation. It is there declared that the identification of the passenger with the negligent driver, without his co-operation or encouragement, is a gratuitous assumption. The same view of the question is entertained by text writers generally, especially in last editions of their works. The older doctrine is rapidly fading out.

1. See full discussion on the doctrine, pages 145-146, *ante*.

2. See discussion of this case in note on the doctrine of *Thorogood v. Bryan*, pages 145-146, *ante*.

A distinction has sometimes been attempted to be made between riding in a public or riding in a private carriage, but that idea has not prevailed to any considerable extent. The cases discuss, as an English court puts it, the broad question as to what is the law applicable to a transaction in which one has been injured and in the course of the transaction there have been negligent acts or omissions by more than one party. In quite a number of the cases the facts were precisely as they are here, and the distinction is not heeded. A few cases like or nearly like the present case are the following: *Robinson v. N. Y. Cent. R. R. Co.*, 66 N. Y. 11; *Masterson v. N. Y. Cent. R. R. Co.*, 84 N. Y. 247; *Cuddy v. Horn*, 46 Mich. 596; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Bennett v. N. J. R. R. & Transp. Co.*, 36 N. J. L. 225 (9 Am. Neg. Cas. 575); N. Y., L. E., etc., *R. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Wabash, St. L. & Pac. R'y Co. v. Shacklett*, 105 Ill. 364 (11 Am. Neg. Cas. 429 n.). See *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544; S. C., 57 Am. Rep. 483, and cases in note.

We are not committed to the doctrine of *Thorogood v. Bryan*, in this State, to an extent preventing its repudiation. In *Dickey v. Telegraph Co.*, 43 Me. 492, the rule was acted on without any expression of dissent by counsel.

The doctrine of imputable negligence, as applicable to the relation of parent and minor child, which presents another and a somewhat different question, has been favorably alluded to in this State, but in cases where it did not affect the result reached on other grounds. *Brown v. E. & N. A. R'y Co.*, 58 Me. 384; *Leslie v. Lewiston*, 62 Me. 468 (1).

A class of cases against towns for injuries caused by defective highways, being statutory actions, stand upon a ground of their own, unaffected by the rule under discussion.

On the terms of the submission of this case to the court by the parties, we think judgment must be entered for the plaintiff for the sum agreed upon as damages.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

1. See NOTE ON IMPUTED NEGLIGENCE, pages 151-156, *ante*.

FLYING SWITCH AT GRADE CROSSING — COLLISION BETWEEN VEHICLE AND TRAIN — NEGLIGENCE OF RAILROAD COMPANY — QUESTION FOR JURY. — In YORK, ADM'R, v. MAINE CENTRAL R. R. CO., 84 Me. 117 (1891), action on the case by Ida M. York to recover damages for personal injuries received by her in collision with train at crossing, caused by the rear division of a freight train of defendant making a flying switch at a grade crossing (the injured party having died before the trial, her administrator prosecuted the suit), verdict for plaintiff for \$1,300 was sustained, and defendant's exceptions overruled. The case was stated by EMERY, J., as follows: "From the evidence reported the following facts may be gathered. The crossing is a short distance west of the East Newport station. The railroad and the highway (from Newport to Stetson) approach the crossing in gradually converging lines and for half a mile or more before reaching the crossing are nearly parallel. Near the crossing the railroad curves gradually to the south and crosses the highway at angle of about thirty-three degrees. The grade of the railroad is descending all the way. The grade of the highway is nearly level to the brow of a hill about 300 feet from the crossing. It there descends to within about fifty feet of the crossing, where it again becomes nearly level. The drop from the top to the bottom of the hill is about fifteen feet. About twenty rods west from the crossing, and between the highway and the railroad is the dwelling house of Mr. Colcord. A traveler on the highway going east had a near and plain view of the railroad on his left for upwards of half a mile before reaching the Colcord house. Near that house the view became more or less obstructed by an orchard, the house and outbuildings, bushes, wood piles, and high land, the railroad and the highway both running somewhat in a cut down the hill. At a point on the highway some seventy-five feet west of the crossing the traveler could plainly see back on the railroad track some 300 feet westerly. Such being the situation, Miss York, the plaintiff's intestate, was alone in a top carriage, driving along this highway easterly toward this crossing. The defendant's freight train of twenty-three cars came along at the same time at a speed of about fifteen miles an hour. She undoubtedly heard the whistle and the train coming up behind her. She may not have looked back, but she was clearly apprised of the train's approach to the crossing. She drove on at a gentle trot down the hill past the Colcord house, and presently saw the locomotive and several cars pass on ahead of her over the crossing, and leave the crossing clear. But some 400 feet back from the crossing, the defendant's servants in charge of the train severed the train in order

to make a flying or running switch, at East Newport station. The locomotive and tender with four cars passed rapidly on, and the remaining cars followed more slowly, impelled only by gravity and the momentum, and uncontrollable except by the ordinary hand brake. When the first section of the train passed the crossing, the rear section was from 100 to 175 feet behind. No necessity was shown for making this flying-switch across the highway. Miss York evidently did not see or hear this rear section, for after the passage of the first section she drove along to the seemingly clear crossing, to pass it. The rear section, however, rushed on from behind upon the crossing, causing the horse to suddenly swerve to the right and throw out Miss York to her injury. There were no gates nor flagmen at this crossing. The brakeman on the rear car of the first section testified to making signs to Miss York of the danger of crossing there; but it does not appear that she understood or even saw these signs. There was also evidence of other minor circumstances which it does not seem to us necessary to state. Two questions, of course, were directly involved in this case. 1. Was it negligence in the defendant company to separate its train to make a flying-switch over that crossing? 2. Was it contributory negligence in Miss York, the plaintiff's intestate, not to look back up the track for possible cars or trains when she arrived at the crossing?" * * *

The court (per EMERY, J.), discussed the questions at length, citing many authorities, and held that the same were for the jury to determine, and the jury having found that the railroad company was negligent in making a flying-switch at the crossing, and that the injured party was not guilty of negligence contributing to the injury, the verdict would not be disturbed. Among the authorities cited by Emery, J., were: *Delaware, etc., Co. v. Converse*, 139 U. S. 467; *Phillips v. Milwaukee, etc., R. R. Co.*, 77 Wis. 349; *French v. Taunton Branch R. R. Co.*, 116 Mass. 537; *Bonnell v. Delaware, etc., R. R. Co.*, 39 N. J. L. 189; *Randall v. Conn. River R. R. Co.*, 132 Mass. 269; *Brown v. N. Y. Cent. R. R. Co.*, 32 N. Y. 603; *Duame v. Chicago, etc., R. R. Co.*, 72 Wis. 523; *Chase v. Me. Cent. R. R. Co.*, 78 Me. 346; *Hooper v. B. & M. R. R. Co.*, 81 Me. 260. JASPER HUTCHINGS, appeared for plaintiff; WILSON & WOODARD, for defendant.

See also *SMITH v. MAINE CENTRAL R. R. Co.*, 87 Me. 339 (1895), collision at crossing, where freight train was making a flying-switch. In this case verdict for plaintiff was set aside on the ground of contributory negligence.

DRIVING ACROSS TRACK — COLLISION WITH TRAIN — DUTY OF RAILROAD COMPANY. — In **WEBB, ADM'R, v. PORTLAND & KENNEBEC R. R. CO.**, 57 Me. 117 (1869), person attempting to drive across track killed by train, verdict for plaintiff sustained and defendant's exceptions overruled. It was held that the question of contributory negligence was for the jury; that a compliance with statutory requirements at railroad crossings does not relieve the railroad company from taking such other precautions which reasonable and ordinary care may require in crossing a crowded thoroughfare leading into a city; that whether the company was negligent in not having a flagman at the crossing was a question of fact for the jury to determine; that a railroad company, when using the track and easement of another similar corporation for the purpose of running their own engine and cars, with their own employees, must be held to observe such precautions for the safety of the public at a crossing, as shall be fully equivalent to those which are required in the exercise of reasonable care and prudence at the hands of the corporation whose road they are using; and an omission which would constitute actionable negligence in the proprietor of the track, is equally culpable in any party that is using the track for the same purpose; and that the establishment of a flag station cannot reasonably be construed as an assertion of a paramount right on the part of a railroad company. Opinion by **BARROWS, J.**

PEDESTRIAN KILLED AT PRIVATE CROSSING — DUTY OF TRAVELER — CONTRIBUTORY NEGLIGENCE. — In **CHASE, ADM'X, v. MAINE CENTRAL R. R. CO.**, 78 Me. 346 (1886), action by administratrix of Edwin F. Chase for personal injuries received while crossing defendant's railroad at a private crossing, verdict for plaintiff for \$3,775 was set aside, on the ground of contributory negligence of injured party. It appeared from the evidence introduced at the trial, that before the location of the railroad, one Blanchard lived on the farm near the river, and had an ordinary farm way from his house to the highway; that when the defendant's railroad was constructed in 1850, it crossed this farm between the highway and the house, crossing this private way; that the railroad was fenced on both sides, with gates on this way in both fences; that the way was used only as a farm way, and the crossing only as a farm crossing down to 1870; in 1880, Kidder, the owner of the farm, sold land below the railroad to the Knickerbocker Ice Company, and granted them the right to use the way, from the highway to the land sold, crossing the railroad, for themselves, their workmen, and all persons having business to transact with them;

that in the winter of 1882, Kidder, at the request of the ice company, took down the gates; that the plaintiff's intestate was at work for the ice company, and was on the way to the river to work for them when the accident happened. The defendant contended that said Edwin F. Chase, at the time he received the alleged injury, was not, as against the defendant, in the rightful use of the way.

In setting aside the verdict the court (per WALTON, J), said: "We think the verdict in this case is clearly wrong. The rule is now firmly established in this State, as well as by courts generally, that it is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is unobstructed, he may have no occasion to listen. But if his view is obstructed, then it is his duty to listen, and to listen carefully. And if one is injured at a railroad crossing by a passing train or locomotive, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence; and if this presumption is not repelled, a recovery for the injury cannot be had. These rules have been so recently and so fully considered by this court that we refrain from discussing them further. It is sufficient to say that they are now the settled law of this State. *LESAN v. ME. CENT. R. R. CO.*, 77 Me. 85; *STATE v. ME. CENTRAL R. R. CO.*, 77 Me. 538; *STATE v. ME. CENTRAL R. R. CO.*, 76 Me. 357." * * * J. W. SPAULDING and F. J. BUKER, appeared for plaintiff; DRUMMOND & DRUMMOND, for defendant. (See former opinion in the Chase case, 77 Me. 62).

As to duty of traveler at crossing: See also *SMITH v. MAINE CENTRAL R. R. CO.*, 87 Me. 339 (1895), collision between vehicle and train at crossing, where verdict for plaintiff for \$4,191 was set aside on the ground of contributory negligence. WHITEHOUSE, J., discussed numerous authorities as to duty of traveler to look and listen before crossing railroad track.

GIBERSON, ADM'X, v. BANGOR & AROOSTOOK R. R. CO., 89 Me. 337 (1896), person driving fatally injured in collision at crossing; verdict for plaintiff for \$1,000 set aside on ground of contributory negligence of injured party; duty of traveler at crossing discussed by EMERY, J., and authorities reviewed.

STATE V. MAINE CENTRAL RAILROAD COMPANY.

Supreme Judicial Court, Maine, March Term, 1894.

[Reported in 86 Me. 309.]

HORSE FRIGHTENED AT CROSSING—COLLISION WITH TRAIN—DRIVER KILLED—HABITS OF ANIMALS—NOISE—INSTRUCTION. — 1. An indictment against a railroad company for negligently causing the death of a person is essentially a civil suit, and is governed by the same rules of law as other civil suits.

2. In such case the right to except to erroneous rulings of the presiding justice is open to both parties, to the same extent as in other civil suits.

3. In the trial of such a cause, it is not error for the presiding justice to instruct the jury that, in determining what was the real cause of the accident, they may call to their aid their general knowledge and experience of the characteristics and habits of horses, and their liability to become frightened by locomotive engines and moving trains of cars, and that collisions at highway crossings are often caused thereby.

(Official.)

APPEAL from Androscoggin County. The case is stated in the opinion. *Exceptions overruled.*

HENRY W. OAKES, County Attorney, and FRANK L. NOBLE, for State.

WALLACE H. WHITE and SETH M. CARTER, for defendant.

Walton, J. — This is an indictment against the Maine Central Railroad Company for negligently causing the death of a person. It appears that Miss Merrow, — a young woman about twenty-five years old, — was traveling alone with a young horse towards the railroad, and, as she approached the crossing, from some cause, the horse commenced to run; that in spite of her efforts and the efforts of the flagman, the horse ran against a passing train, and Miss Merrow was killed. The case has been tried and a verdict returned in favor of the railroad company; and the case is before the law court on exceptions by the State.

The first question is whether exceptions will lie in behalf of the State in such a case. We think the question must be answered in the affirmative. It is true that in criminal prosecutions, — prosecutions strictly criminal, — exceptions do not lie in behalf of the State. But it has been held that prosecutions like this are criminal in form only, — that they are essentially civil suits, — and must be governed by the rules of law applicable to civil suits. *State v. Railroad*, 77 Me. 244. Such being the settled law in

this State, we fail to see any reason why the right to except should not be open to both parties as in other civil suits. We think it should. We will assume, therefore, that the exceptions are properly before us and proceed to examine them upon their merits.

It is claimed that the presiding justice erred in his charge to the jury; that he authorized them to find facts as to the existence of which no evidence was offered. The portions of the charge complained of are as follows:

“Now, applying your memory and judgment to all the evidence in the case, what was the real cause of the accident resulting in the death of Miss Merrow? You have a right to apply your observation, your general knowledge of matters of this kind, in ascertaining what it was. If any omission of duty on the part of the railroad company or its employees frightened the horse, so that he became uncontrollable, that might be a ground of action. It is for you to determine whether it was so. In your common observation, it may be that you have observed sometimes that when you are driving a horse ordinarily kind and manageable, in the vicinity of a railroad, while you hear no noise of an approaching train, the horse does hear it, with its keen instinct, and springs into a faster speed at once, and you may wonder why it is, until in a moment you hear the sound also. And you may have observed that a horse is anxious, approaching a railroad crossing, to spring into speed and get across as soon as possible. If that is the case, and results from the character of the horse, and is not caused by any means of fright resulting from the wrongful act of the railroad company or its servants, then that does not lay a foundation for an action. It is only when the negligence of the company causes the death, and the party killed was in the exercise of due care at the immediate time and occasion.”

It is claimed that these instructions authorized the jury, in determining whether the fright of the horse was the result of the character of the horse or the negligent act of the railroad company, to inquire into and find facts, as to the existence of which not a *scintilla* of evidence was offered; that it permitted them to apply their common observation and personal knowledge in determining the existence of a fact vital to the case, — and it is insisted that in these particulars the instructions were erroneous.

The instructions undoubtedly authorized the jury to take notice

of one of the characteristics of all horses, — namely, their liability to take fright and run away, — and that in this particular they might act upon their common observation and general knowledge of horses. In this assumption the plaintiff's counsel are undoubtedly right. But was this erroneous? There are many things of which judges and jurors are allowed to take notice without any other proof than their own observation and experience. Are not the habits and general characteristics of our domestic animals among this number? We think so. "What is notorious needs no proof." *State v. Intoxicating Liquors*, 73 Me. 279. It is not always easy to determine whether or not a given fact has become sufficiently notorious to be taken judicial notice of without proof. If it has, then jurors may act upon it without proof. If it has not, then they cannot be allowed to act upon it without proof, although the fact may be known to one or more of the panel. The rule of law is plain enough. The lawyers employed in this case do not seem to differ about it. They cite and rely upon the same authorities. The difficulty is in its application. There are many facts in relation to electricity and its uses that to-day are known to almost every schoolboy, which, a few years ago, were known only to a few. To-day, they may be taken judicial notice of. Then, they could not. Exactly when the transition took place it might be difficult to say. But it seems to us that at this day the fact that horses are liable to be frightened by locomotive engines and moving trains of cars, and that collisions at highway crossings are often caused thereby, are facts sufficiently notorious to be taken judicial notice of, and that it cannot be error, in the trial of a cause for an injury so received, to instruct the jury that in weighing the evidence, and determining what was the real cause of the accident, they may call to their aid their observation and general knowledge of such matters, — not, of course, any knowledge they may have of that particular accident, but their general knowledge of the character and habits of horses, and how such accidents are liable to be produced. And as the instructions excepted to went no further than that, we think the entry must be: Exceptions overruled.

TEAM KILLED AT CROSSING — DUTY OF RAILROAD COMPANY TO AVOID COLLISION. — In *PURINTON v. MAINE CENTRAL R. R. CO.*, 78 Me. 569 (1887), collision with team at crossing, verdict for plaintiff for \$132.47 was sustained. The question was whether the verdict was so clearly against the weight of

evidence as to require the court to set it aside and grant a new trial. The court (per WALTON, J.), said: "We do not think it is. The collision occurred at a crossing in the town of Deering. It was in March, and the ground was bare near the railroad track, and a little distance from the track the highway was icy and slippery. The plaintiff's goods were on a sled drawn by four horses. When the sled crossed the track it struck upon the bare ground and stuck. The horses had reached the icy portion of the highway, and when they attempted to pull hard enough to start the load they would slip, and one of them fell. The teamster was notified that a train was approaching, and he seems to have made every effort possible to get out of the way, but he was unable to do so. To add to his embarrassment, the gatetender let a swing gate down on to his load. It was then impossible for him to move forward without tearing his load to pieces or breaking the gate. Several bystanders tried to assist him; and one of them told him not to be excited, that the trainmen saw him and were slowing up the train. And he was finally told that the train had stopped. But this proved not to be true, or, if true, the train started again and moved down upon him at the rate of about four miles an hour, and in attempting to pass him, struck the hind end of his load and knocked it to pieces."

* * * "It has been decided again and again that it is the duty of the traveler upon a highway to look carefully for approaching trains before attempting to cross a railroad track. But the duty of keeping a sharp lookout does not rest upon him alone. It is equally the duty of those in charge of a train of cars to keep a sharp lookout. Horses are liable to become unmanageable at railroad crossings. They may become frightened, or as in this case, a team may get stuck and be unable to move on; and it is the duty of those in charge of trains of cars to be watchful, and if they see that such an accident has happened, to endeavor to stop their trains in season to avoid a collision." * * * Judgment on the verdict for plaintiff.

Collisions and crossings. — For other MAINE cases relating to COLLISIONS AND CROSSINGS AND ACCIDENTS ON TRACK, see *LESAN v. MAINE CENTRAL R. R. Co.*, 77 Me. 84; *HOOPER v. BOSTON & MAINE R. R. Co.*, 81 Me. 260; *STATE v. MAINE CENTRAL R. R. Co.*, 76 Me. 358; *STATE v. MAINE CENTRAL R. R. Co.*, 77 Me. 538; *GARLAND v. MAINE CENTRAL R. R. Co.*, 85 Me. 519, 521; *ROMEO v. BOSTON & MAINE R. R. Co.*, 87 Me. 549; *ALLEN v. R. R. Co.*, 82 Me. 111; *GROWS v. MAINE CENTRAL R. R. Co.*, 67 Me. 100, 69 Me. 412; *WHITNEY v. MAINE CENTRAL R. R. Co.*, 69 Me. 208; *PLUMMER v. EASTERN R. R. Co.*, 73 Me. 591.

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it cannot be held, as matter of law, that a person, 16 years of age, who attempts to cross track by climbing over cars standing at

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the fact that passengers who, with plaintiff, were warned of impending danger escaped from car before collision, does not show negligence on part of plaintiff in failing to escape.....Ky. 579

whether person driving was negligent in failing to stop before crossing track to look and listen for train, or railroad company negligent in failing to give proper warning of approach of train, were questions for the jury.. Ky. 587

in action to recover damages for personal injuries not resulting in death, error to instruct as to wilful negligence, as that degree of negligence has no place in Kentucky law except in actions re-

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- charge making ignorance of law on part of railroad employees an excuse, properly refused. Ala. 75

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- where plaintiff's intestate in attempting to escape from car to avoid impending collision was killed on platform, and other passengers got off safely, and one who remained in the car was not

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- killed, the evidence did not establish contributory negligence. . . . Ark. 133
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- passenger on train not bound to warn railroad employees of impending danger. Ind. 445
- gross negligence to leave passenger car on track when freight train was approaching without notifying the latter or flagging same to avoid collision. Ky. 579
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WITNESS.

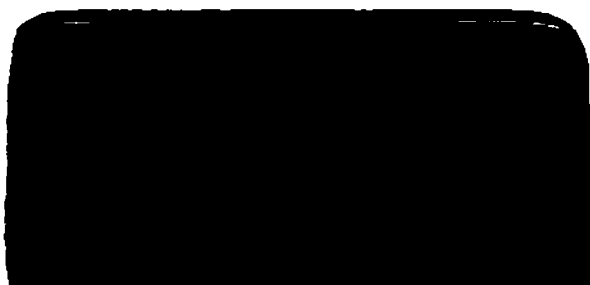
- a physician may, after a personal examination, testify as an expert to the nature of plaintiff's injuries, and state his opinion that they were caused by a fall, but where he personally knows nothing of the facts, he cannot state that they were caused by a fall from a horse at a particular railroad crossing described in the complaint.. ..Ala. 71
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